19

CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS,

OF THE

STATE OF MISSOURI,

FROM MAY 9, 1888, TO JULY 2, 1888.

REPORTED BY
E. A. LEWIS, of the St. Louis Bar,
AND
JAS. F. MISTER, of the Kansas City Bar,
OFFICIAL REPORTERS.

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JUDGES OF THE

St. Louis Court of Appeals.

Hon. RODERICK E. ROMBAUER, *Presiding Judge.*

Hon. SEYMOUR D. THOMPSON, } *Judges.*
Hon. CHARLES E. PEERS, }

John Lewis, *Clerk.*

Edward A. Lewis, *Reporter.*

JUDGES OF THE

Kansas City Court of Appeals.

Hon. JOHN F. PHILIPS, *Presiding Judge.*

Hon. JAMES ELLISON, } *Judges.*
Hon. WILLARD P. HALL, }

Finis C. Farr, *Clerk.*

James F. Mister, *Reporter.*

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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1888. 31 1 / 53 500

ISAAC MEREDITH, Respondent, v. MUNSON M. WILKINSON, Defendant; WALTER S. WILKINSON *et al.*, Interpleaders, Appellants.

St. Louis Court of Appeals, May 8, 1888.

1. EVIDENCE—ADMISSIONS.—In a controversy about the alleged fraudulent transfer of property, it is not admissible to prove statements made by the vendor to a third person, not in the presence of the vendees, affecting the title of the vendees, after the purposes of the conspiracy, if any, have been accomplished. Nor are such statements by the vendor, when made after the transfer, with possession, admissible on general principles, to affect the title of the transferee.

2. PRACTICE—INSTRUCTIONS.—An instruction may omit an element proper to be considered in the respective rights of the parties, and yet there will be no error if such element be clearly supplied in other instructions given.

3. PRACTICE—INSTRUCTIONS—USE OF THE WORD "GROSSLY."—There is no error in the use of the word "grossly" in an instruction which declares that the amount of a surety's responsibility must not be "grossly inadequate" to the value of the property transferred for indemnity of the suretyship.

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4. PRACTICE—OPENING AND CLOSING.—The right to open and close the argument may be awarded in the sound discretion of the court, and error is not assignable thereof, except in cases of manifest abuse or prejudice.

APPEAL from the Perry Circuit Court, HON. JAMES D. FOX, Judge.

Reversed and remanded.

E. & W. ROBB, for the appellants: The verdict is so utterly at variance with common sense, so opposed to the weight of evidence, so against the manifest truth of the matter, so opposed to the law, even as declared by the trial court, that it must have been the result of caprice, prejudice, passion, or some other cause other than a conviction that appellants acted in bad faith in purchasing the property, and it should not be permitted to stand. *Spohn v. Railroad*, 87 Mo. 74; *Whitsett v. Ransom*, 79 Mo. 258; *Garrett v. Greenwell*, 92 Mo. 120; *Rothchilds v. Railroad*, 92 Mo. 91; *Baker v. Stonebraker's Adm'r*, 36 Mo. 345; *Price v. Evans*, 49 Mo. 396; *Caldwell v. Smith*, 88 Mo. 44. And in this view the testimony should be considered in the light of the following proposition of law: That when all the facts bearing upon the question of the intent of a transaction will as well consist with honesty as with dishonesty and fraud therein, the court ought not to find the same to be corrupt and fraudulent; the proof of the fraud should be perfectly satisfactory. *Dallam v. Renshaw*, 26 Mo. 533; *Hausmann v. Hope*, 20 Mo. App. 193; *Rumbolds v. Parr*, 51 Mo. 592; *Page v. Dixon*, 59 Mo. 43; *Henderson v. Henderson*, 55 Mo. 534; *Funkhouser v. Lay*, 78 Mo. 462; *Lennox v. Harrison*, 88 Mo. 491; *Jones v. Talbot*, 4 Mo. 279; *Muenks v. Bunch*, 90 Mo. 500; *Priest v. Way*, 87 Mo. 16. The court erred in admitting the testimony of John C. Schudy, on behalf of plaintiff, as to the declarations of Munson M. Wilkinson. Declarations of the grantor made after the sale was completed and interpleaders had taken possession

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of the property, not made in the presence or hearing of either of them, are mere hearsay and incompetent to invalidate the title of his grantee. *Albert v. Besel*, 88 Mo. 150; *Gordon v. Ritenour*, 87 Mo. 54; *Gutzweiler v. Lackmann*, 39 Mo. 91; *Ladd v. Couzins*, 35 Mo. 513; *Holmes v. Braidwood*, 82 Mo. 610; *Stewart v. Balls' Adm'r*, 35 Mo. 202; *Worley v. Watson*, 22 Mo. App. 546. Nor is the testimony of said witness admissible on the theory that there was a conspiracy, for the following reasons: (1) Because there was no conspiracy proven, and the act or declaration of one of several charged with entering into a conspiracy is inadmissible to prove the conspiracy or common design. (2) Because the declarations testified to were not made in furtherance of and in the prosecution of the conspiracy charged and while it was in *fieri*. (3) Because the conspiracy charged was in the execution of the bill of sale and the sale and delivery of the property, and it is proven and admitted in plaintiff's answer that the bill of sale was executed and the property sold and delivered on December 1, 1886, and the declarations testified to have been made to Schudy were made after the time Munson Wilkinson left home, which was on December 7, and consequently they were made after the completion or consummation of the act charged; and in this last view, even had there been a conspiracy proven in the execution of the bill of sale and the sale and delivery of the property, the declarations would be inadmissible, because the acts or declarations of one conspirator are not admissible against another, when the common enterprise is ended, whether by accomplishment or abandonment. *State v. McGraw*, 87 Mo. 161; *State v. Fredericks*, 85 Mo. 145; *State v. Reed*, 85 Mo. 194; *State v. Barham*, 82 Mo. 67; *Laytham v. Agnew*, 70 Mo. 48; *Boyd v. Jones*, 60 Mo. 454; *Weinrich v. Porter*, 47 Mo. 293; *State v. Duncan*, 64 Mo. 262; *State v. Daubert*, 42 Mo. 239; *State v. Ross*, 29 Mo. 32, 50, 51; *Wright v. Cornelius*, 10 Mo. 174; *Weinstein v. Reid*, 25 Mo. App. 41; *Nasse v. Algermissen*, 25 Mo. App.

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186. The declarations were not made in regard to the execution of the bill of sale and were inadmissible. *Boyd v. Jones*, 60 Mo. 454, 471. For the reasons given in the foregoing proposition the court erred in refusing instruction number seven, asked by interpleaders; or to say the very least, the court erred in refusing instruction number eight, asked by them. *Holmes v. Braidwood*, 82 Mo. 610. The court erred in giving instructions one, two, and three, for plaintiff, in not recognizing the right of a debtor to prefer one creditor to another. The rule is well settled that a debtor has the right to prefer a particular creditor over his other creditors, and this implies the right of acceptance, even if in so doing it shall hinder and delay other creditors, and it is no objection to an assignment made to pay a *bona-fide* debt that the intent of the parties was to postpone or hinder other creditors. *Singer v. Goldenberg*, 17 Mo. App. 549; *Shelley v. Boothe*, 73 Mo. 77; *Lane v. Ewing*, 31 Mo. 75; *Holmes v. Braidwood*, 82 Mo. 610; *Saddlery Co. v. Urner*, 24 Mo. App. 534; *Cordes v. Straszer*, 8 Mo. App. 61; *Greely v. Reading*, 74 Mo. 309. Instruction number four, given for plaintiff, is meaningless and misleading. The instruction should have defined what was meant by the expression—"if the amounts of their debts and the amounts necessary to indemnify them as sureties were grossly inadequate" to the value of the property transferred. *Mueller v. Ins. Co.*, 45 Mo. 84; *Wiser v. Chesley*, 53 Mo. 547; *Edelmann v. Transfer Co.*, 3 Mo. App. 503; *McPheeters v. Railroad*, 45 Mo. 26; *Boocher v. Nassee*, 75 Mo. 383; *Speak v. Ely & Walker*, 22 Mo. App. 122. The errors complained of in the instructions given for plaintiff were not cured by the giving of other correct instructions, or the giving of correct instructions for the other party, since it cannot be determined whether the jury was influenced by the erroneous or the valid instruction. *Jones v. Talbot*, 4 Mo. 279; *Nasse v. Algermissen*, 25 Mo. App. 186; *State v. Clevenger*, 25 Mo. App. 653; *Thomas v. Babb*, 45 Mo. 384; *Frederick*

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Allgaier, 88 Mo. 598; *Goetz v. Railroad*, 50 Mo. 472; *Buel v. Transfer Co.*, 45 Mo. 562; *Otto v. Bent*, 48 Mo. 23; *Binbeutel v. Nauert*, 2 Mo. App. 295. The court erred in allowing plaintiff the opening and closing in the case. *Burgert v. Borchert*, 59 Mo. 80, 85; *Spooner v. Ross*, 24 Mo. App. 599; *Nolan v. Deutsch*, 23 Mo. App. 1.

JOHN V. NOELL and JOHN H. NICHOLSON, for the respondent: An appellate court will not disturb a verdict on the ground merely that it is against the weight of evidence unless it can be seen that the preponderance is so great as to imply some gross partiality or some prejudice or misconduct on the part of the jury. *Spohn v. Railroad*, 87 Mo. 84; *Whittsett v. Ransom*, 79 Mo. 260; *Baker v. Stonebraker's Adm'r*, 36 Mo. 345; *In re Bowman*, 7 Mo. App. 569; *Robert v. Eyerman*, 7 Mo. App. 592; *Brown v. Railroad*, 13 Mo. App. 462; *Greffet v. Dowdal*, 17 Mo. App. 280, 283; *O'Connor v. Standard Theatre Co.*, 17 Mo. App. 675; *Walker v. Owens*, 25 Mo. App. 587; *Townsend v. Gates*, 25 Mo. App. 336; *Burgert v. Borchert*, 59 Mo. 80. The acts and declarations established at the trial were sufficient *prima-facie* proof of conspiracy to justify the action of the court in permitting the testimony of the witness Schudy to go to the jury for their consideration on the whole case. *Commonwealth v. Scott*, 123 Mass. 222; s. c., 25 Am. Rep. 81; *Commonwealth v. Brown*, 14 Gray, 419; *Miller v. Barber*, 4 Cent. Law Jour. 177-8; *People v. Parish*, 4 Penn. 153; *Sweat v. Rogers*, 6 Tenn. 118; *Page v. Parker*, 40 N. H. 62. In order to ascertain whether the acts and declarations of the grantor are admissible, it devolves upon the court to determine for itself whether other facts are sufficiently proved and whether these facts are *prima-facie* sufficient proof that the parties have combined to effect the fraudulent design. If it finds that there is such proof, it admits the declarations as fit evidence to be considered by the jury in forming their judgment on the whole

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case, and who may, nevertheless, negative the combination. *Burke v. Miller*, 7 Cush. [Mass.] 547; Bump on Fraud. Conv. [2 Ed.] 567; *State v. Ross*, 29 Mo. 32, 51; *Boyd v. Jones*, 60 Mo. 454. Generally the declarations of a grantor, made after the execution of his deed, cannot be made use of to defeat the deed. There are, however, several exceptions to this general rule, and one exception is that, where the parties to the instrument have entered into a common scheme to hinder, delay, or defraud the creditors of the grantor in the deed, and the declarations are made by the grantor while engaged in the prosecution of that plan. *Boyd v. Jones*, 60 Mo. 454; *Gardner v. Preston*, 2 Day, 205; see note in 2 Am. Dec. 95; *Bank v. Russell*, 50 Mo. 531, 534; *Cordes v. Straszer*, 8 Mo. App. 61; *Holmes v. Braidwood*, 82 Mo. 610; *Weinrich v. Porter*, 47 Mo. 293; 1 Wharton Law of Evidence [2 Ed.] sec. 259; Bump on Fraud. Conv. [2 Ed.] 566. It was competent for the plaintiff to put in evidence any acts and declarations of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the execution of the bill of sale. *Commonwealth v. Brown*, 14 Gray, 419; *Commonwealth v. Scott*, 123 Mass. 222; *Kimmel v. Geeting*, 2 Grant [Pa.] Cas. 125. Neither the word "grossly" nor the word "inadequate," as used in said instruction, has any technical meaning different from its ordinary signification, and both being common English words, whose meaning is well defined in the ordinary dictionaries of the language, and well understood by all understanding said language, there was no necessity for defining either of said words in the fourth instruction mentioned. *Johnson v. Sullivan*, 23 Mo. 474, 481; *Berry v. Wilson*, 64 Mo. 164, 165; *Steinkamper v. McManus*, 26 Mo. App. 51. Instructions one, two, and three, given for plaintiff, did not negative the right of a debtor to prefer one creditor to another, and on the contrary, instructions two and three, given for interpleaders, expressly asserted this right to the fullest extent permitted by the law. The party on whom the

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burthen of proof rests is entitled to open and close the case. *Porter v. Jones*, 52 Mo. 403; *Harvey v. Heirs of Sullens*, 56 Mo. 372; *Tibeau v. Tibeau*, 22 Mo. 77; *Reichard v. Ins. Co.*, 31 Mo. 518.

THOMPSON, J., delivered the opinion of the court.

The plaintiffs sued out two successive attachments against the property of Munson M. Wilkinson. Both were levied upon certain personalty claimed to be the property of the defendant, but found in the possession of Walter S. Wilkinson and Benjamin F. Wilkinson, who were partners doing business under the name of Wilkinson Brothers. These latter interpleaded for the property, claiming it by virtue of an absolute bill of sale, by which defendant had undertaken to convey it to them to satisfy certain indebtedness alleged to be due to them from him, and also to indemnify them as sureties on certain promissory notes of his. The plaintiff answered the interplea charging in substance that the conveyance to the interpleaders was contrived between them and the defendant for the purpose of hindering, delaying, and defrauding the creditors of the latter. The issue was tried by a jury, who returned a verdict for the plaintiff and against the interpleaders, upon which judgment was entered that they take nothing by their interplea; and from this judgment they now appeal to this court. We shall notice the principal errors which they assign, not noticing several which do not seem to require any observation.

I. The first is that "the verdict is so utterly at variance with common sense, so opposed to the weight of the evidence, so against the manifest truth of the matter, so opposed to the law, even as declared by the trial court,—that it must have been the result of caprice, prejudice, passion, or some other cause other than a conviction that appellants acted in bad faith in purchasing the property, and it should not be permitted to stand." We are of opinion that this assignment of

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error is not well taken. The verdict is plainly supported by substantial evidence, and is not opposed to the law as declared by the court.

II. After defendant had transferred the property in controversy to the interpleaders and delivered the possession of it to them, he started for California. On his way thither he stopped at St. Louis, and called upon the firm of Brockmeyer & Sevil, and there had a conversation with Mr. Schudy, who was employed in that house, and represented to him that he (Schudy) was to have half of his wheat crop the coming year, and that another man was to have the other half; that he had left word with Walter Wilkinson (one of these interpleaders) that it was to be fixed in that way; and that he asked for a loan of one hundred dollars, upon the strength of Brockmeyer & Sevil getting half of his wheat crop. This testimony was objected to by the interpleaders, on the ground that the declarations or statements of the vendor of the interpleaders, made after the sale and delivery of the property to them, not in their presence and hearing, or in the presence or hearing of either of them, were not competent to affect their rights. The court overruled this objection, and the interpleaders excepted. This ruling was plainly erroneous. Assuming that a sufficient foundation had been laid for the introduction of the evidence of the statements of the defendant on the ground that a conspiracy to defraud the creditors of the defendant had been shown to exist between the defendant and the interpleaders,—yet the evidence was inadmissible upon plain principle, because it was not made while the conspiracy was subsisting, but was made after it had accomplished its purpose and had come to an end. The acts or declarations of a co-conspirator, made after the common enterprise has come to an end, whether by accomplishment or abandonment, are not admissible in evidence against the others. *State v. Ross*, 29 Mo. 32; *Laytham v. Agnew*, 70 Mo. 48; *State v. Barham*, 82 Mo. 67, 73; *State v. Fredericks*, 85 Mo. 145; *State v. Reed*, 85 Mo. 194; *State*

v. Duncan, 64 Mo. 262; *State v. McGraw*, 87 Mo. 161; *Weinstein v. Reed*, 25 Mo. App. 41, 46; *Nasse v. Algermissen*, 25 Mo. App. 186, 189. In conformity with this principle, there is the further rule that after a vendor has parted with his possession he has no more power to affect the title of his vendee, either by his acts or declarations, than a mere stranger has, but that any declarations which he may thereafter make are hearsay evidence merely, and hence not admissible. *Steward to use v. Thomas*, 35 Mo. 202; *Gutzweiler's Adm'r v. Lackmann*, 39 Mo. 91; *Weinrich v. Porter*, 47 Mo. 293. An exception to this rule has been admitted in the case where the vendor remains in possession after the sale, in which case his declarations are receivable, as against his vendee, as a part of the *res gestae*, for the purpose of showing that the sale was made in fraud of his creditors. *Boyd v. Jones*, 60 Mo. 454, 471. But this exception does not cover the evidence which the court let in, in the present case; because, although the evidence tended to show that the defendant did remain in possession of some of the property included in the bill of sale, namely, the household goods,—yet he did not remain in the possession of the property which the plaintiff attached in the hands of the interpleaders, and which is the property in controversy. It is admitted that he transferred the possession of this property to them, and that they were in possession and he absent from the state, at the time when it was attached.

III. For the reasons above given, the court also erred in refusing the seventh and eighth instructions tendered by the interpleaders, one of which sought to rule out and the other to limit the effects of the foregoing evidence.

IV. The error of admitting the foregoing evidence was increased by the giving of the following instruction at the request of plaintiff:

"8. The court instructs the jury that if, from a full and fair review of all the facts and circumstances in evidence, they believe that defendant and interpleaders

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combined or conspired together, either to hinder, delay or defraud the creditors of defendant, or any of them, then all the declarations and acts of either the defendant or interpleaders, made and done in furtherance of said conspiracy to hinder, delay or defraud, though made in the absence of the other party or parties to such conspiracy, may be taken into consideration in determining whether said bill of sale was executed by defendant and accepted by interpleaders with the intent to hinder, delay or defraud the creditors of defendant, or any of them."

This instruction did not discriminate between the declarations of the co-conspirators made *dum fervet opus*, and declarations of one of them, not either of the interpleaders herein, and not a party to the issues on trial, made after the conspiracy had ended. It was, therefore, tantamount to telling the jury that they were at liberty to consider the evidence of Schudy and hence tending to increase the prejudice created by the admission of that evidence.

V. We see no other error in the instructions of which the interpleaders can complain. Taken as a whole, with the exception above stated, they seem to have submitted the issue fairly to the jury, and in a manner approved by the decisions of the Supreme Court. So far as the first, second, and third instructions given for the plaintiff failed to recognize the right of a debtor to prefer one creditor to another, they were supplied by other instructions which were given; and these instructions, read in connection with the other instructions, do not present a case of contradictory instructions. In the fourth instruction given for the plaintiff, the jury were told that if the amount of the debt which the defendant owed the interpleaders and the amounts necessary to indemnify them as sureties, were "grossly inadequate to the value of the property transferred by said bill of sale to interpleaders, at the time of the execution of said bill of sale, such fact, together with all other surrounding circumstances, may be taken into consideration

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by the jury in determining whether such sale was fraudulent," etc. Exception is taken to the use of the word "grossly." We think this is a very strained criticism; for although in some cases, especially of negligence, the use of the word "gross" in an instruction without defining it has been condemned, yet this instruction merely submitted to the jury the legal proposition that, where a debtor turns over his property to a particular creditor to pay or secure him, if the value of the property turned over is grossly disproportionate to the debt intended to be paid or secured, this is evidence from which an intent to defraud creditors may be inferred. In such a connection, "grossly" means no more than *very* or *very greatly*. It is an ordinary word, which every man is presumed to understand, and we do not think that it is error to use it in this connection without attempting a specific definition. Courts do not generally assist juries, but rather trammel and embarrass them, when they attempt to define what is already sufficiently plain. In this case, the evidence tended to show that there was a wide disproportion between the amount of indebtedness and the contingent liability intended to be paid and secured, as claimed by the interpleaders, by the transfer of this property and the value of the property itself; and whether this was a gross disproportion within the rule was a question of fact for the jury.

VI. For the reasons stated more at length in the recent case of *Elder v. Oliver*, 30 Mo. App. 575, we must hold that no error available to the interpleaders was committed in awarding to the plaintiff the right to open and close. The matter is one resting in the sound discretion of the trial court, the exercise of which discretion is not assignable for error except in cases of manifest abuse or prejudice.

For the errors above pointed out, the judgment will be reversed and the cause remanded. All the judges concur.

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CHARLES H. PARKS *et al.*, Respondents, v. THE PEOPLE'S BANK OF DE SOTO *et al.*, Appellants.

St. Louis Court of Appeals, May 8, 1888.

1. EQUITY—INJUNCTION IN FAVOR OF EQUITABLE TITLE.—One who has purchased land before the date of a judgment against his vendor, taking only a memorandum of the purchase and acquiring no conveyance until after the rendition of the judgment, may have injunction to restrain an execution sale under the judgment. Such a case is distinguishable from that of a purchaser who holds an unrecorded deed at the time of the judgment, and to whom the relief will be denied.

2. EQUITY—MULTIPLICITY OF SUITS.—Where the plaintiffs, if compelled to defend their title in an action at law against a purchaser under the execution, would successfully rely on the same facts which they here urge for equitable relief, it is a proper exercise of equity jurisdiction to grant the relief sought, in order to prevent a multiplicity of suits.

3. STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM.—Where the answer admits that the lands levied on are the lands described in the petition, and were inherited by the vendor from his father, it cannot be objected that the memorandum offered in evidence, which describes the lands as having been left to the vendor by his father, is insufficient under the statute of frauds. The description substantially identifies the property.

4. PER THOMPSON, J., DISSENTING:—The holder of a memorandum of purchase at the date of a judgment against his vendor stands in no better position than if he held an unrecorded deed, instead; and, according to the current of Missouri decisions, he would not, in the latter case, be entitled to the relief here sought.

APPEAL from the Jefferson Circuit Court, Hon. JOHN L. THOMAS, Judge.

Affirmed, and certified to the Supreme Court.

JOS. P. TATUM and THOMAS & HORINE, for the appellants: Sales *in invitum* are sometimes enjoined on the ground of casting a cloud on title, but that reason is not set up in this case, nor is it given in the finding of

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the court. Even were it claimed, it would not apply here, as the law in this state clearly and unequivocally is, that sheriffs' sales under execution, of the interest of the execution debtor, will not be enjoined at the suit of a third person, on the ground that it is his land that the sheriff is about to sell and not the defendant's in the execution, nor for the reason that a cloud will be thereby cast upon the title. *Witthaus v. Bank*, 18 Mo. App. 181; *Kuhn v. McNeil*, 47 Mo. 389; *Drake v. Jones*, 27 Mo. 428. The evidence does not show an agreement to convey; nor do the receipts set out such agreement, nor are they effective as a purchase and sale. The receipts moreover call, if they do call, for half of an undivided fifth. Which half? Which fifth? Where located? Plaintiffs, therefore, had no equity for specific performance. The case is within the statute of frauds. *Whaley v. Hinchman*, 22 Mo. App. 483; *Scarrit v. Church*, 7 Mo. App. 174; *Schroeder v. Taaffe*, 11 Mo. App. 267; *King v. Wood*, 7 Mo. 389; *Ivory v. Murphy*, 36 Mo. 541; *Springer v. Kleinsorge*, 83 Mo. 153. The plaintiffs did nothing under their alleged purchase. There must be some part performance—some substantial change in the situation of the parties. Browne Stat. Frauds, secs. 448, 448*a*, 452; *Williams v. Morris*, 95 U. S. 444; *Townsend v. Hawkins*, 45 Mo. 286. The Supreme Court of Missouri still adhere to the doctrine that a third party cannot interfere with a sale of another's interest or right. *Wilcox v. Walker*, 13 West. Rep. 263.

JOSEPH J. WILLIAMS, for the respondents: When the judgment was rendered against William M. Parks, the legal title resided in him, plaintiffs being the equitable owners. A sale under an execution issued on the judgment, at any time during the continuance of the lien, and sheriff's deed would pass the legal title to the execution purchaser, which would take effect, by relation, as of the date of the judgment lien, and defeat the legal title acquired by plaintiffs by their deeds of date January 8, 1887. Injunction was the appropriate

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and only remedy. 1 High on Inj. [2 Ed.] sec. 369; *Orr v. Orr*, 3 J. J. Marsh. 269. The contract is sufficiently definite. Its sufficiency is not questioned by the answer. Browne on Statute of Frauds [4 Ed.] sec. 385.

ROMBAUER, P. J., delivered the opinion of the court.

This is a bill in equity seeking to restrain the defendant bank, a judgment creditor of Wm. M. Parks, from causing its judgment and execution to be enforced against certain lands formerly the property of said Parks and now the property of the plaintiffs.

The plaintiffs state in their petition that in March, 1885, Wm. M. Parks sold to them for a valuable consideration his interest in certain lands inherited from his father, and at that time executed and delivered to them memoranda of the sale, but made no formal conveyances of the land until January, 1887; that the defendant bank, in September, 1886, recovered a judgment against Parks and caused an execution to be issued thereon which the defendant sheriff under its direction levied upon Parks' interest in said lands, although he had no interest therein, threatening to sell the same and thereby subject plaintiffs to a multiplicity of suits. The plaintiffs pray that the bank be restrained from selling the lands under said execution or any execution which might thereafter be issued on such judgment.

The defendants appeared and took issue by answer. They admit that the lands levied on are the lands described in plaintiffs' petition, and were inherited by Wm. M. Parks from his father. They claim that the lien of the bank's judgment attached to said lands prior to the acquisition by plaintiffs of any legal interest therein, and aver that at and before the rendition of said judgment Wm. M. Parks was the legal owner thereof, and if the plaintiffs had any equitable rights or claims against it such claim was unknown to the officers of the bank prior to the filing of the petition herein. The answer states that the sale averred in the petition from

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Parks to plaintiffs was a mere pretense, that the memoranda were executed after the judgment was rendered, and that no money or other valuable consideration was ever paid to Parks by the plaintiffs for said lands. The answer sets up some facts by way of estoppel which it is unnecessary to notice, since they were denied by reply, and no evidence was offered in their support.

The court granted a restraining order upon the filing of the petition and upon the final hearing made the injunction perpetual as prayed for, awarding against plaintiffs all the costs which were caused by the levy of the execution and the advertisement of the lands for sale. From this decree the defendants appeal, and assign for error that there is no equity in the bill and that the evidence does not support the decree.

It has been decided at an early day in this state "that under our system of laws and the practice in reference to execution sales it would be unwise and create great confusion in the administration of justice to permit sales under execution to be enjoined on the ground that they will pass no title, and might cast a cloud on the title of the true owner." *Drake v. Jones*, 27 Mo. 433. The ground upon which the decision was put was that a proceeding by injunction ought not to be substituted for an action of ejectment, when in fact no real controversy might arise after the sale. This ruling was followed in *Kuhn v. McNeil*, 47 Mo. 389, and was approvingly cited in *McPike v. Pen*, 51 Mo. 63. It was extended even to sales under deeds of trust where the title was matter of record, on the ground that the plaintiff has a complete and adequate remedy at law against any claim that might be asserted by the purchaser in the courts by virtue of any title he may acquire at such sale and which he must take with notice of plaintiff's record title.

On the other hand it has been held that the sheriff will be enjoined from the sale of land for nonpayment of taxes although the assessment be illegal, when a cloud will thereby be thrown upon the title. *Lockwood v. St.*

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Louis, 24 Mo. 20; *Fowler v. St. Joseph*, 37 Mo. 228; *Leslie v. St. Louis*, 47 Mo. 474; *McPike v. Pen*, 51 Mo. 63. And the same rule was applied to sales under deeds of trust in *Vogel v. Montgomery*, 54 Mo. 577, and *Matthews v. Skinker*, 62 Mo. 329.

It is difficult to reconcile the cases in this state on the question under what circumstances a sale will be restrained in equity on the ground that it will cast a cloud upon the plaintiff's title, but it may be conceded that where the plaintiff has a full and adequate remedy at law in defending against an action of ejectment, the courts will not enjoin a sale under execution on the ground that the defendant in the execution has no title in the land vendible on execution. The cases of *Drake v. Jones*, and *Kuhn v. McNiel*, *supra*, go no further than this; and we may concede that, under these decisions, if the mere effect of a sale in this cause would have been to cast a cloud upon the legal title of plaintiffs, their bill should have been dismissed for want of equity.

But the case of plaintiffs is different. At the date of the recovery of this judgment the legal title to the land was in the execution debtor, and the lien of that judgment at once attached to such title. If the legal title, at that date, had passed out of the debtor his grantees, even though their deed were unrecorded, could, by recording their deed prior to the execution sale, have acquired a valid legal title against the purchaser at the execution sale. *Davis v. Owenby*, 14 Mo. 170; *Valentine v. Havener*, 20 Mo. 133; *Potter v. McDowell*, 43 Mo. 93; *Reed v. Ownby*, 44 Mo. 204; *Black v. Long*, 60 Mo. 181. But such would not be the effect of an acquisition of the legal title by them subsequent to the recovery of the judgment.

While under our practice a defendant in ejectment may defend upon the strength of an equitable title (*Valle v. Fleming*, 29 Mo. 152; *Shroyer v. Nickell*, 55 Mo. 264; *Jones v. Manly*, 58 Mo. 559; *Harrington v. Fortner*, 58 Mo. 468; *Carter v. Prior*, 78 Mo. 222), it is,

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to say the least, doubtful how far he could successfully defend upon the strength of a mere equitable right against a purchaser at the execution sale buying without notice.

These considerations lead us to the conclusion that the plaintiffs by their petition show themselves entitled to equitable relief.

But even if we were mistaken in this view, and even if the petition, under the ruling in *Kuhn v. McNiel*, *supra*, were demurrable, we would not feel warranted to reverse the judgment on that ground alone. No demurrer was interposed. The defendant went to trial upon the facts, and the plaintiffs having substantiated the facts by evidence, the defendant now claims that a trial upon the facts was erroneous and unwarranted. The Supreme Court has repeatedly decided that when a correct result is reached, although the proceedings were had upon an erroneous theory and irregular, the judgment should not be reversed. *Conley v. Doyle*, 50 Mo. 234, 235; *Mississippi River Bridge Company v. Ring*, 58 Mo. 491, 495.

Assuming that the plaintiffs might defend successfully in an action of ejectment if the sale were not enjoined, their defence would be purely equitable. Their defence would have to be tried before the same tribunal which passed upon their cause of action in this proceeding and upon the identical facts which were passed upon by the judge in rendering this decree. As it may reasonably be assumed that the court would come to no other conclusion upon such retrial, the only result of reversing this decree and remitting the parties to their action at law would be a multiplication of suits and costs without substantial benefit to any one. This, in our opinion, should be done in no case.

The memorandum referred to in plaintiffs' petition and offered in evidence is in the following words:

"March 10, '85. Crystal City, Mo.

"Received of Charles H. Parks the sum of four

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hundred dollars for one-half of my undivided one-fifth interest, or half of all my real estate left to me by my father.

"WM. M. PARKS."

It will be noticed that the defendant's answer admits that the lands levied on are the lands described in plaintiff's petition and were inherited by Wm. M. Parks from his father. When the memoranda were offered in evidence the only objection made to them by defendants was, that they were irrelevant and incompetent as evidence and that they could not be read in evidence to affect defendants. Defendants now contend that the memoranda are *too* indefinite as memoranda of written agreements under the statute of frauds. We will discuss the question thus raised as if saved by a sufficient objection. The Supreme Court of the United States, in *Williams v. Morris*, 95 U. S. 444, gives this succinct definition of a sufficient memorandum: "Any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the statute, and parol evidence is admissible to explain latent ambiguities, and to apply the instrument to the subject-matter," but "unless the essential terms of the sale can be ascertained from the writing itself or by reference in it to something else, the writing is not a compliance with the statute, and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent."

The writing may be sufficient, however informal. A letter, a receipt for money, a bill of parcels, or a stated account in which the vendor of land charges himself with the price, is sufficient under the statute, provided, it is signed by the party to be charged, or his duly authorized agent, and is sufficiently definite in its terms so as to be capable of specific enforcement. Browne Stat. of Frauds, sec. 346.

In this case, there is no patent ambiguity in the

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memorandum. The lands left by his father to Wm. M. Parks are the lands inherited by him from his father. There can be no possible misunderstanding on that subject. The subject-matter of the sale may always be identified by reference to an external standard, and need not be in terms explained. Thus the description as the vendor's right in a particular estate, or as the property which the vendor at another time had purchased from a particular party, has been held sufficient. *Nichols v. Johnson*, 10 Conn. 192, 199; *Phillips v. Hooker*, Phil. [N. C. Eq.] 193, 197.

Judged by the above standard, the memoranda were sufficient evidence of a sale under the statute of frauds. That they were executed at the time when they purport to bear date, and that the sales were made for a valuable consideration is established by the evidence, and a careful perusal of the record satisfies us, in no way shaken by evidence furnished by the surrounding circumstances. That transactions of this kind should be closely scrutinized we all concede, but that furnishes no ground to vacate them for fraud on bare suspicion.

It results that the equity in plaintiffs' bill is supported by the evidence, and that there is no error in the decree.

Judgment affirmed. PEERS, J., concurs; THOMPSON, J., dissents.

THOMPSON, J., delivered a dissenting opinion.

I dissent from the opinion which has been delivered in this case, on the ground that it is contrary to the decisions of the Supreme Court in *Drake v. Jones*, 27 Mo. 428, and *Kuhn v. McNeil*, 47 Mo. 389 (followed by this court in *Witthaus v. Washington Sav. Bank*, 18 Mo. App. 181, 184), where it was held that a suit cannot be prosecuted for an injunction to restrain the sale of land under an execution, on the ground that such a sale will pass no title and will cast a cloud on the title of the real owner. I see nothing to take this case out of the rule. If the plaintiffs have such a title as is available

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to them in equity, then they have such a title as will support a defence in an action of ejectment. This is shown by the following decisions: *Tibeau v. Tibeau*, 19 Mo. 78; *Harris v. Vinyard*, 42 Mo. 568; *Hayden v. Stewart*, 27 Mo. 286; *Baker v. Nall*, 59 Mo. 265; *Valle v. Fleming*, 29 Mo. 152; *Shroyer v. Nickell*, 55 Mo. 265; *Jones v. Manly*, 58 Mo. 559; *Le Beau v. Armitage*, 56 Mo. 191; *Harrington v. Fortner*, 58 Mo. 468; *Evans v. Snyder*, 64 Mo. 516; *Sims v. Gray*, 66 Mo. 613; *Collins v. Rogers*, 63 Mo. 515; *Long v. Joplin Co.*, 68 Mo. 422. It is, therefore, not necessary to the safety of their title that the ordinary course of justice should be disturbed by the remedy which they now seek.

Aside from this, their position is not one which entitles them to be favored in a court of equity. There is much reason to believe that the bank may have given the credit upon the faith of William M. Parks being the owner of the interest in the land in controversy which, fifteen months before, according to his testimony, he had transferred by a secret bargain, to his brother and sister, these plaintiffs. This will appear from the following brief statement of facts: On March 10, 1885, according to the evidence adduced in behalf of the plaintiffs, they each purchased, for the sum of four hundred dollars, of their brother, William M. Parks, one-half of his interest in the real estate descending to him from their deceased father. They each took written receipts therefor, specifying the nature of the transaction with sufficient definiteness to make a contract good within the statute of frauds, as my brethren in their opinion find, with which conclusion I agree. When this contract was taken they had made full payment of the agreed purchase price to him, and were entitled to deeds of purchase. They did not demand such deeds, although they might have had them if they had demanded them. The reason why they did not demand and receive them was that they regarded it as a family matter and thought that it was important only to themselves. They thus allowed the

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legal title to the interest in the land which they had purchased to remain in their brother and vendor, Wm. M. Parks, until the seventh of January, 1887, and allowed him to hold himself out to the world as the owner of this interest in his deceased father's estate and to obtain credit on the faith of such ownership. This sufficiently appears from his own testimony, as follows, and there is no countervailing testimony in the record: "I signed the note on which the bank got judgment. It is dated June 10, 1886. * * * The record showed that I owned this property [meaning the interest in the land here in controversy]. It stood in my name on the records. I never told the bank I did not own any real estate, that I had sold it." If the bank gave the credit on the faith of Wm. M. Parks being the owner of this property, then the plaintiffs would, by reason of their negligence, be estopped from setting up their equitable title as against the bank or the purchaser at execution sale, under the decision of this court in *Haskell v. Whyte*, 11 Mo. App. 585, which decision stands unreversed, and, so far as I know, has not been overruled. I am not prepared to say that in the absence of more distinct evidence to the effect that the bank did extend the credit on the faith of Wm. M. Parks being the owner of this property, there is evidence which could estop the plaintiffs from setting up their equitable title as a defence to an action of ejectment. I understand it to be an elementary principle that equity exerts its extraordinary powers in favor of the diligent. But here these plaintiffs come into court with no better title to a mode of relief which wrests the process of the law out of its ordinary course, than their own gross negligence in not taking and putting upon the records the deed which they might have had, at the time when, according to their evidence, the sale of the land to them was made, which fact, if done, would probably have prevented this credit from being given. Negligence will not always bar equitable relief; but it ought to bar such relief where there is ground for believing that the

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party against whom the relief is sought may have been prejudiced by it.

Nearly all the cases of fraudulent conveyances which have come before me since I have been a judge of this court, have taken the form of secret family shuffles of which the public were in no way apprised. In respect of personal property, such conveyances would be void under our statute of frauds. Our registration law does not extend its protection to subsequent creditors; but the public records of land titles afford means to which creditors constantly resort for information as to the standing of those who seek credit from them, and under such conceptions of equity as would afford relief in this case, the recording acts, intended for the protection of subsequent purchasers, become an instrument of fraud against subsequent creditors.

It is true, as stated in the opinion of my learned brethren, in this case, that numerous decisions in this state settle the principle that a *bona-fide* purchaser of land, who has failed to record his deed until after a judgment has been recovered against his vendor, but who records it prior to sale under the judgment, can hold it against a purchaser under the judgment. *Fox v. Hall*, 74 Mo. 316, and cases cited. But the difficulty with the case of the plaintiffs is, that they *had no deed* at the time when the judgment was recovered against their vendor and at the time when the lien of that judgment attached to their vendor's interest in the land. They now seek to have the aid of a court of equity to give them a *better position* than this rule of the law gives them, and on the ground that equity follows the law. Equity indeed follows the law, but it does not go beyond the law when to do so is contrary to justice.

I am of opinion that this judgment should be reversed and the suit dismissed.

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CITY OF HANNIBAL, Respondent, v. MISSOURI & KANSAS TELEPHONE COMPANY, Appellant.

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St. Louis Court of Appeals, May 8, 1888.

1. **MUNICIPAL ORDINANCE—TELEPHONE POLES.—A municipal ordinance which peremptorily directs a change in the location of telephone poles, as previously permitted and occupied, cannot be upheld when it is neither averred nor shown that the existing location incommodes the public, or that any good reason exists for the removal.**

2. **MUNICIPAL ORDINANCE—DEPENDENT PROVISIONS.—If two parts of an ordinance are practically dependent upon each other, and one of them is void, the other cannot be sustained or enforced.**

3. **MUNICIPAL ORDINANCE—UNREASONABLE AND OPPRESSIVE.—Although municipal corporations are *prima-facie* the sole judges of the necessity of their ordinances, yet, if one is altogether unreasonable and oppressive, it may be vacated by the courts for that reason alone. Such an ordinance is one which discriminates between a particular corporation and others using similar poles, in requiring a change of location which will interrupt its business without apparent good reason, and a total removal of all standing poles as a condition precedent to the right of re-location, and which fails to provide for any practicable re-location.**

4. **MUNICIPAL ORDINANCE—CLASS LEGISLATION.—A municipal ordinance which demands that an individual corporation shall do a certain thing, and then provides a penalty against any person, company, or corporation which shall fail to do that thing, it being impossible for any other to do it, is obnoxious to the constitutional inhibition of class legislation, and, therefore, void.**

APPEAL from the Hannibal Court of Common Pleas, HON. THOMAS H. BACON, Judge.

Reversed.

HARRISON & MAHAN, for the appellant: Appellant's objection to the introduction of any testimony on the complaint should have been sustained. The complaint did not state facts sufficient to constitute a cause

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of action. The ordinance "concerning the use of certain streets," approved April 21, 1886, and "to effect the removal of posts and poles" of appellant from Broadway and Main streets, in the city of Hannibal, is in direct conflict with section 879, Revised Statutes, and did not give appellant an opportunity to be heard in regard to an alteration, as required by law. Appellant had a right on said streets, while this ordinance clearly contemplated an entire removal of all the poles and posts therefrom. Rev. Stat., sec. 888; *State ex rel. v. Flad*, 23 Mo. App. 185. The city council of Hannibal did not have the authority to lay an embargo upon and exclude appellant from the use of any street. Rev. Stat., sec. 879; *Tel. Co. v. Town*, 31 N. J. Eq. 627; *Tel. Co. v. City*, 8 Am. & Eng. Corp. Cas. 538, 544. Respondent does not contend that the poles were erected in such a manner as to incommode the public in the use of the streets. No such charge was ever made. They were authorized, erected, and regulated both by legislative and municipal enactment, and were required by the public to promote trade and facilitate communications in daily transactions of business between the citizens of one part of the city with another. It is a proper use of the streets, and the city of Hannibal cannot legally prevent it. *Building Ass'n v. Telephone Co.*, 88 Mo. 258; *Gay v. Telegraph Co.*, 12 Mo. App. 485. The ordinance approved May 15, 1886, "notifying, ordering, and requiring appellant to remove and take away from each and every public sidewalk constituting a part of, or being in or on any of the public streets, avenues, or alleys, within thirty days, all posts, piers, etc.," in consideration of their alteration; and levying a fine on appellant for refusing, is in conflict with statutes, in violation of appellant's rights, and, therefore, void. While the statute permits respondent to regulate, it only contemplates an alteration when a pole or poles "incommode the public in the use of the street." It never was intended to permit an arbitrary and sweeping removal without cause, like that attempted here. Appellant had

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the right to use any and all public streets. Rev. Stat., secs. 879, 888; *Telephone Co. v. Mayor*, 16 Am. & Eng. Corp. Cas. 289. Such an ordinance must be reasonable and fair. It cannot interdict, lay an embargo, prohibit, or confiscate. Property rights are not subject to the uncontrolled and arbitrary will of a common council. All ordinances and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land; and an ordinance which violates principles of legal and equal rights is void. *In re Frazee on Habeas Corpus*, 15 Am. & Eng. Corp. Cas. 13; *Tel. Co. v. Town*, 31 N. J. Eq. 627. The ordinance approved May 15, 1886, is unreasonable, unjust, prohibitory, oppressive, and void. All the facts and circumstances, as shown by the evidence, clearly indicate that its enforcement would destroy appellant's property, confiscate its business, and drive it from the city. *Corrigan v. Gage*, 68 Mo. 541; *Kelley v. Meeks*, 87 Mo. 396, 401; *State ex rel. v. Beattie*, 16 Mo. App. 131, 147; Dill. Mun. Corp. [3 Ed.] sec. 319; Field on Corp., sec. 296; *Dunham v. Rochester*, 5 Cow. 462; *Commissioners v. Gas Co.*, 12 Pa. St. 318; *Commonwealth v. Worcester*, 3 Pick. 462; *Clason v. Milwaukee*, 30 Wis. 316; *Commonwealth v. Robertson*, 5 Cush. 438; *Mayor v. Thorne*, 7 Paige, 261; *Mayor v. Winfield*, 8 Hump. 707; *City v. Weber*, 44 Mo. 547. There are two other corporations engaged in a similar business to appellant in the city of Hannibal, having their poles and posts located in like and similar places on the public streets, one of said corporations so erecting said poles and posts before, and the other after, appellant. This ordinance is directed solely against appellant, and is, therefore, a special and unwarranted discrimination, made in contravention of common right, and is illegal and void. *City v. Spiegel*, 90 Mo. 587; *Mayor v. Althrop*, 5 Cold. [Tenn.] 555; *Ex parte Hanson*, 28 Fed. Rep. 126, 129; Dillon Mun. Corp. [3 Ed.] secs. 322, 325. The instruction given by the court of its

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own motion erroneously declared the law. It asserts that the part of the ordinance requiring the removal of the telephone poles is valid, but that part of the ordinances re-locating the poles three hundred feet apart is unreasonable and void. This is a clear misconception of the ordinance; the first and second sections thereof are so mutually connected with and dependent upon each other as conditions and considerations for each other that they must be taken and considered as a whole —they cannot be divided, but must stand or fall together. *City v. Railroad*, 89 Mo. 44; s. c., 14 Mo. App. 221, 225; *Austin v. Murray*, 16 Pick. 121, 126; Dillon Mun. Corp. [3 Ed.] sec. 421; *Warren v. Mayor*, 2 Gray [Mass.] 84; *Commonwealth v. Hitchings*, 5 Gray, 482; *Commonwealth v. Stoddard*, 2 Cush. 562; *Municipality v. Morgan*, 1 La. Ann. 111, 116; *Commonwealth v. Dow*, 10 Met. 382; *Rogers v. Jones*, 1 Wend. 237; *Sheldon v. Mayor*, 30 Ala. 540; *Thomas v. Mt. Vernon*, 9 Ohio, 290; Grant on Corp. 88.

THOMAS F. GATTS and DAVID H. EBY, for the respondent: The ordinance "concerning the use of certain streets," approved April 21, 1886, expressly provided that the matter to be considered by the council would be the alteration in the location of the poles, and expressly gave to appellant an opportunity to be heard in regard to such proposed alteration. The ordinance did not contemplate the removal of the poles from any street, nor to lay an embargo upon or exclude appellant from any street, and was not in conflict with either of the statutory provisions cited by appellant. Rev. Stat., secs. 879, 888. The city of Hannibal had the right to enforce the legislative limitation of the use of streets, within its corporate limits, by telephone corporations. *State ex rel. v. Flad*, 23 Mo. App. 185. The expression "in such manner as not to incommode the public in the use of such roads, streets, and waters," contained in section 879, Revised Statutes, can relate only to the original location of telephone lines. What

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may have been a proper location ten years ago, may, owing to the migratory character of "business centers," the increase of population, the competition and requirements of other industries, together with other causes, to-day be highly objectionable and demand proper regulation and control. It was not necessary that, before the city of Hannibal could alter the location of the telephone poles on Broadway, the original location of such poles should have been such as to "incommode the public." The ordinance approved May 15, 1886, so far as it required the removal of the poles from the sidewalks, was in no respect unreasonable, unjust, prohibitory, or void. *Tel. Co. v. City*, 1 Atl. Rep. 184; *Forsythe v. Tel. Co.*, 12 Mo. App. 494; Horr & Bemis on Municipal Ordinances, sec. 244*a*, p. 239, sec. 128, p. 92; *Tel. Co. v. Chicago*, 16 Fed. Rep. 309; s. c., 11 Biss. 539; *Commonwealth v. Boston*, 97 Mass. 555; *Tel. Co. v. Newark*, 10 East Rep. 122; *State ex rel. v. Flad*, 23 Mo. App. 185; *Neier v. Railroad*, 12 Mo. App. 25; Horr and Bemis on Municipal Ordinances, sec. 128, p. 92. Said ordinance was not a "special and unwarranted discrimination," as there was only one company operating telephone lines in the city. Appellant had no perpetual easement in the sidewalks for the purpose of maintaining its poles. If appellant had removed the poles from the sidewalks, the ordinance would have been complied with. Its provisions are clearly separable. The appellant could have re-located its poles at the corners of the streets, and also at necessary intervening points; for if, as the court below held, that part of the ordinance forbidding intervening poles was unreasonable and void, appellant could still, irrespective of the provisions of the ordinance, have availed itself of the provisions of section 888, Revised Statutes, which it invokes. It cannot, therefore, complain. A fair doubt should be resolved so as to effectuate the ordinance. Horr & Bemis on Municipal Ordinances, 109; *Railroad v. City*, 47 N. J. 286; *Page v. City*, 20 Mo. 136, 143.

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ROMBAUER, P. J., delivered the opinion of the court.

The plaintiff is a municipal corporation and the defendant is a telephone company incorporated under article five, chapter twenty-one, of the Revised Statutes.

It appears that in 1879-80 the Hannibal Telephone Company and its grantors erected, under authority of a city ordinance authorizing the erection and maintenance of a telephonic exchange in said city, a number of telephone poles, including the poles in controversy, along Broadway, which poles have been used ever since by said company and its successors in connection with said telephonic exchange. The defendant is a successor of said Hannibal Telephone Company.

In May, 1886, some controversy arising between the city and defendant as to the defendant's compliance with the original ordinance authorizing the erection of such poles, the following ordinance was passed by the city council, and approved by the mayor:

"An ordinance requiring the removal from the sidewalks of the city of Hannibal, of the posts, piers, and abutments of the Missouri and Kansas Telephone Company.

"Be it ordained by the city council of the city of Hannibal:

"Section 1. That the Missouri and Kansas Telephone Company, a corporation doing business in the city of Hannibal, in the state of Missouri, are hereby notified, ordered, and required to remove and take away from each and every public sidewalk, constituting a part of, or being in or on, any of the public streets, avenues, or alleys in said city, and within thirty days from the date of the publication of this ordinance, all posts, piers, and abutments now standing or being on the said sidewalks or any of them, and owned, controlled, operated, or maintained by said Missouri and Kansas Telephone Company.

"Sec. 2. In lieu of the present location of said posts, piers, and abutments, and in consideration of the

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alteration in the location of the same as provided for in section one of this ordinance, license is hereby granted to said telephone company to re-locate, place, and erect upon any of the public streets in said city, wherein any of said posts, piers, and abutments are now standing, being, or erected, such posts, piers, and abutments, as said company may see proper to erect; provided, however, that such future erection and re-location of said posts, piers, and abutments by said company, in said streets, shall be outside of, and not immediately contiguous to, the sidewalks of said city, and shall be only at the vertices of the angles of intersection of the streets in said city, as they lie outside of said sidewalks; and, provided further, that the right to reërect or re-locate said posts, piers, and abutments shall be and is conditional upon said company first complying with the requirements of section one of this ordinance.

"Sec. 3. In the event that said telephone company shall fail, neglect, or refuse to comply with the requirements of section one of this ordinance, then, and in that event, the street commissioner of said city is hereby authorized, directed, instructed, and empowered to remove the posts, piers, and abutments mentioned in said section one, at the expense of the persons, companies, or corporations owning, operating, or maintaining the same, and to report the cost of such removal to the attorney of said city who shall proceed to collect the same from the parties liable therefor.

"Sec. 4. Any person, company, or corporation that shall violate any of the provisions of this ordinance, or that shall fail, neglect, or refuse to comply with the same, shall forfeit and pay to said city a fine of one hundred and fifty dollars."

The defendant upon demand neglected and refused to remove its poles, as required by the first section of the ordinance. The city thereupon filed a complaint against it before its recorder for the recovery of the fine mentioned in the fourth section, and upon a trial of such complaint before the common pleas court, on

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appeal, obtained judgment for the amount of the fine and costs. From that judgment the defendant prosecutes the present appeal, and assigns the following errors: (1) That the complaint states no cause of action and the court erred in admitting evidence in its support; (2) that the evidence substantiates no cause of action, and the court should have rendered judgment for the defendant; (3) that the court gave an erroneous instruction or declaration of law.

In *State ex rel. v. Flad*, 23 Mo. App. 186, the respective rights of telephone companies, and the municipalities whose streets they occupy with their poles, were defined as follows: "By section 879, of the Revised Statutes, it is provided as follows: 'Companies organized under the provisions of this article for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires, and other fixtures, along and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets, and waters.' The only limitation imposed by the legislature upon this privilege relating to the use of the streets and alleys of cities and towns for telephone posts is embodied in section 888 of the Revised Statutes, which is in the following language: 'The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town, through which the lines of any telephone or telegraph company are to pass, may, by ordinance, or otherwise, specify where the posts, piers, or abutments, shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or erection of said posts, piers, or abutments,

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and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alterations.' It will be seen that this limitation relates exclusively to three subjects: (1) The place where the posts, piers, or abutments shall be located; (2) the kind of posts that shall be used; (3) the height at which the wires shall be run."

The defendant does not question the right of the city in this instance to make a regulation in regard to its poles "as to the place where the posts, piers, or abutments shall be located," but contends, that when posts are once located an alteration in their location cannot be arbitrarily made without some cause showing a necessity for the alteration. As the complaint fails to state any necessity for the change or any valid reason for the passage of the ordinance providing for the re-location, the defendant objects to it as stating no cause of action.

The recorder's court of Hannibal, where the complaint was originally filed, is not a court of record. Very informal complaints are held sufficient when filed before a justice, and we are not prepared to say that the complaint is fatally defective for the reason assigned. There was, however, no proof that the existing location of defendant's poles incommodes the public, or that any good cause existed for the contemplated removal; and in the absence of such proof the ordinance cannot be upheld. Besides that, the proof shows and the court so found that the contemplated re-location is impracticable, as it would place part of defendant's poles at too great a distance from each other for practical operation of its lines. So finding, the trial court properly declared that part of the ordinance providing for a re-location illegal and void. As the two parts of the ordinance are necessarily dependent on each other, the case is not one where an ordinance void in part can be upheld as to other parts, and that of itself is fatal to plaintiff's recovery.

Municipal corporations are *prima facie* the sole judges of the necessity of their ordinances, and courts

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will not, ordinarily, review their reasonableness, when they are passed in strict pursuance of an express grant. *City of St. Louis v. Green*, 7 Mo. App. 468; s. c., 70 Mo. 562. Where an ordinance, however, is altogether unreasonable and oppressive, it may be vacated by the courts for that reason alone. *Corrigan v. Gage*, 68 Mo. 545; *Springfield Railway Co. v. City of Springfield*, 85 Mo. 674; *Kelly v. Meeks*, 87 Mo. 401.

It is shown in this case that other corporations use the same streets for similar purposes, and that there is no substantial difference between the location of their poles and those of defendant. It is further shown that the only practicable way of effecting a change of poles so as not to cause an interruption of business, is a gradual and fractional change, the erection of new poles necessarily preceding the removal of the old. That an ordinance which discriminates against the defendant, which demands a re-location of its poles without apparent good reason, which demands a total removal of all standing poles, as a condition precedent to the right of re-location, and which fails to provide for any practicable re-location, presents such features of oppression and unreasonableness as to call for the exercise of the powers of the court last above referred to, admits of no dispute.

We do not hesitate to declare the ordinance under which the defendant is prosecuted to be illegal and void for these reasons alone. There is, however, a further feature of this ordinance so extraordinary in its character that we cannot pass it in silence. It will be seen that it first demands that the defendant should do a certain thing, and then provides that any person, company, or corporation, who shall fail to do the thing, which, in the nature of things, the defendant alone can omit to do, shall be guilty of a misdemeanor. This is class legislation of the most obnoxious character. Municipal corporations exercise only powers delegated to them by the legislature, and where the legislature has no power

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to do a thing it cannot delegate it to others. The constitutional inhibition imposed on the legislature against class legislation is necessarily imposed on every municipality. Even in the absence of a special constitutional inhibition, such legislation could not be upheld. Thus Judge Cooley says that it can scarcely be doubted but that a regulation made for any one class of citizens, entirely arbitrary in its character and restricting their rights, privileges, or legal capacities, in any manner before unknown to the law, "would transcend the due bounds of legislative power even though no express constitutional provision could be pointed out with which it would come in conflict." Cooley's Const. Lim. 393. See for an elaborate discussion of this subject, *Bank v. Cooper*, 2 Yerg. 599, and *Jones v. Perry*, 10 Yerg. 59.

It necessarily results from the foregoing observations that the judgment of the court upon the uncontroverted facts was an erroneous conclusion of law, and must be reversed. As no prosecution can be had under an ordinance which we are bound to declare illegal and void, no useful purpose can be subserved by remanding the cause. Judgment reversed. All concur.

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BOONE A. GRIFFITH, Plaintiff in Error, v. GEORGE A. GILLUM, Defendant in Error.

St. Louis Court of Appeals, May 8, 1888.

1. **EVIDENCE—RES INTER ALIOS ACTA.—In an action by a landlord for the defendant's conversion of the tenant's crop upon which the plaintiff had a lien, the record of a judgment previously obtained by the plaintiff against the tenant was properly excluded from evidence, as being *res inter alios acta.***

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2. EVIDENCE — IRRELEVANT, BUT NOT PREJUDICIAL. — The improper admission of irrelevant evidence for the purpose of sustaining a defence, will not be regarded as prejudicial error, where other and competent evidence for the same purpose is so abundant and so strong that the irrelevant evidence cannot be supposed to have had any controlling influence on the result.

3. EVIDENCE—CONSIDERATION.—Where it was claimed that the tenant's sale of his crop to the defendant was made with the landlord's consent, there was no error in the admission of testimony tending to show that the defendant had paid an indebtedness as surety for the tenant, to an amount forming part of the purchase price for the crop.

4. PRACTICE—INSTRUCTIONS. — An instruction to the effect that the defendant was liable to the plaintiff if he bought the crop of plaintiff's tenant, knowing of the plaintiff's lien thereon, was properly refused, under the evidence, without the qualification, *unless* it appeared that the plaintiff had previously waived his lien and given his permission for the sale. Nor was there any error in giving an instruction to the effect that, if the plaintiff, prior to the sale of the crop, gave his tenant permission to sell the same, and intended thereby to waive his lien and look to the tenant for payment of the rent, then the verdict should be for the defendant.

5. WAIVER—CONSIDERATION.—A consideration, such as is necessary to support a contract, is not necessary to support a waiver.

ERROR to the Louisiana Court of Common Pleas, HON. E. M. HUGHES, Judge.

Affirmed.

I. C. DEMPSEY and W. H. BIGGS, for the plaintiff in error: The papers and judgment, in the case of Boone A. Griffith *vs.* Gordon A. Thorp, was competent, for the purpose of establishing the amount due from Thorp to plaintiff as rent for plaintiff's farm for 1886, and that the same had not been paid. The testimony introduced by defendant tending to show that he had permitted Thorp, his tenant, to sell the crops grown upon his farm for several years previous to 1886, should have been excluded. It had no tendency to prove that plaintiff had waived his lien on the crop for 1886. It

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was clearly prejudicial to plaintiff's case, and was calculated to mislead the jury. *Faulkner v. Harding*, 9 Mo. App. 12. The theory of defendant that if plaintiff gave Thorp permission to sell the wheat and that plaintiff agreed to waive his lien thereon, provided Thorp would sell the wheat, and that, by virtue of this agreement, plaintiff lost his lien, cannot (we think) be sustained. The only consideration shown for this agreement on part of plaintiff was the undertaking on the part of Thorp to sell the wheat. Thorp, in this, assumed no new obligation, nor did he acquire any new right not before possessed. Thorp could sell the wheat and pass a good title to the purchaser, provided the plaintiff received the purchase money. *Haselton v. Ausherman*, 87 Mo. 410. It was Thorp's duty, under the law, to take proper care of the wheat, and it was also his duty and legal right to dispose of the same in a way not prejudicial to plaintiff's interests. All the purchaser would have to do in order to protect his title to the wheat would have been to see to the proper application of the purchase money. The plaintiff had no title whatever to the property. Neither had he the right to the possession. *Sheble v. Curat*, 56 Mo. 437. Plaintiff had a legal right or lien on the wheat, and before defendant can escape liability in this case, he must not only show that plaintiff actually agreed to release the wheat from his lien for his rent, but he must also predicate this agreement on a valuable consideration. *Haselton v. Ausherman*, 87 Mo. 410. What did Thorp agree to do? He agreed to sell the wheat. This he was bound to do outside of this promise. *Farringdon v. Ballard*, 40 Barb. 512. And the further promise that he (Thorp) would pay the money to plaintiff does not alter the case. This, also, he was legally bound to do, to the extent of that year's rent; and as the wheat only brought three hundred and eighty dollars, and the rent due plaintiff was five hundred dollars, this would furnish no consideration upon which to base the contract. There must not only be a consideration for an

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agreement to waive a lien, but the intention to waive it must be clearly shown by the evidence. *Muench v. Bank*, 11 Mo. App. 144. The court permitted defendant to show that, in 1886, Thorp was indebted to him, and that defendant (who was Thorp's security) paid a part of the debt. The defendant's counsel stated in the presence of the jury that his object in offering the testimony was to show that defendant used the money arising from the sale of the wheat in paying Thorp's debts. This was clearly error. *Sanders v. Orlhauson*, 51 Mo. 163; *Knox v. Hurst*, 18 Mo. 243.

D. A. BALL, for the defendant in error: The court did not commit an error in refusing to allow plaintiff to read in evidence the papers and judgment in the case of Griffith *v.* Thorp. Gillum, the defendant in this case, was no party to that suit, therefore, could not be bound by said papers or judgment. If the defendant Gillum knew of the custom and manner of dealing, handling, disposing, and selling of the crops between plaintiff and Thorp, and he certainly did from the testimony, then the evidence was competent. The evidence was competent as tending to prove a waiver of plaintiff's lien, coupled with his dealing, acts, etc., in 1886. *Hanley v. Ins. Co.*, 4 Mo. App. 253; *Horn v. Peteler*, 16 Mo. App. 438. The third error complained of is, that the permission given by plaintiff to Thorp to sell the wheat and the acceptance of the note, etc., is no waiver of the lien for the reason that there was no consideration. This certainly cannot be the law, when the rights of third parties intervene as in this case. The facts were known by defendant, and plaintiff by his acts, as the testimony in the case proves, waived his lien on the wheat, and he is now estopped from claiming the amount of the wheat of defendant. *Hanley v. Ins. Co.*, 4 Mo. App. 253; *Horn v. Peteler*, 16 Mo. App. 438; *Moores v. Martin*, 23 Mo. App. 657. It may be true that plaintiff Griffith had no right to the possession of the crop raised by Thorp before the rent was due, yet no

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one will contend that after it became due that he did not have the right to take it by law. Rev. Stat., 1879, sec. 3091; *Chamberlain v. Heard*, 22 Mo. App. 416. The real question is, did the plaintiff waive his lien on the crop of wheat raised in 1886? The facts as substantially proven by defendant were, that Thorp had rented the land of plaintiff for five years; that after the wheat had been threshed in 1886 it remained on the ground where threshed for six weeks, and while there on the ground plaintiff and Thorp, his tenant, had a settlement, and plaintiff accepted Thorp's note for the rent due for 1886, together with all back rent, in all about twelve hundred dollars, and gave Thorp permission to sell and dispose of the crop. These facts defendant knew, and relying upon them, he, as he had a right to do, took the wheat away and received the money for it. Several months after this plaintiff institutes this suit. We, therefore, hold that plaintiff waived his lien in so far as this defendant is concerned. *Garnhardt v. Finney*, 40 Mo. 449; *Milton v. Smith*, 65 Mo. 315; *Williams v. Porter*, 51 Mo. 441.

THOMPSON, J., delivered the opinion of the court.

The plaintiff rented to one Thorp a farm for the year 1886 for the annual rental of five hundred dollars, to be paid on the first of August of that year. Thorp had been the tenant of the farm for several previous years, and on the first of August, 1886, owed the plaintiff, on account of rent for previous years, about seven hundred dollars. About that time Thorp, without paying the rent for the year 1886, turned over to this defendant, who was his brother-in-law, most of the wheat which he had grown upon the place in the season of 1886, which the defendant sold for three hundred and eighty dollars. Thorp did this for the purpose of discharging a liability which he had incurred in favor of the defendant in an amount exceeding four hundred dollars. Two hundred dollars of this liability was for money loaned by the defendant to Thorp, for which the defendant had taken

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a mortgage upon this very crop, with the knowledge of the plaintiff, as the defendant's evidence tended to show. The defendant's evidence tended to show that, when Thorp turned over the wheat to the defendant, the plaintiff had given him (Thorp) permission to sell the same. Shortly after Thorp turned over the wheat to the defendant, he and the plaintiff had a settlement for all rents due on account of Thorp's occupancy of the farm, including the five hundred dollars, due for the year 1886, in which settlement an amount exceeding twelve hundred dollars was found due from Thorp to the plaintiff, for which Thorp gave the plaintiff his promissory note. The plaintiff, at the time of this settlement, desired Thorp to secure the note in some way, but Thorp was unable to do so.

This action is brought by the plaintiff against the defendant to recover damages for the conversion of the wheat which Thorp turned over to the defendant, on the theory that, when it was so converted, the plaintiff had a landlord's lien upon it, of which fact the defendant had knowledge. The answer admits the purchase of the wheat from Thorp and that it was grown on the plaintiff's farm in the year, 1886; but sets up, among other things, that, prior to the defendant's purchase of the wheat from Thorp, the plaintiff had given Thorp permission to sell same.

The case was tried before a jury, and resulted in a verdict and judgment for the defendant, to reverse which this writ of error is prosecuted.

I. The first error which is assigned is, that the court excluded from evidence the record in an action previously prosecuted by the plaintiff against Thorp, in which the plaintiff had recovered a judgment against Thorp. It was offered in evidence for the purpose of showing that the rent for the year 1886 had not been paid by Thorp. There was no error in this ruling. The defendant was not a party to this action, and, therefore, the record of the judgment proved nothing as against him. It was *res inter alios acta*. *Missouri Fire Clay*

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Works v. Ellison, 30 Mo. App. 67. But if it had been competent evidence, the error of ruling it out would not have been prejudicial, because the fact that Thorp had not paid any part of the rent for the year 1885, was otherwise proved at the trial and was not controverted.

II. It is next assigned for error that the defendant was allowed to introduce testimony tending to show that the plaintiff had permitted Thorp, while occupying the farm as his tenant, to sell crops growing upon his farm during several previous years. This was error. Any indulgence which he had extended to Thorp in the matter of paying his rent in previous years would not tend to show that he had waived his lien for rent upon the crop of 1886. But it does not follow that, because the evidence was irrelevant and ought to have been excluded under the plaintiff's objection, the error of admitting it was necessarily prejudicial, so as to require a reversal of the judgment. The direct evidence that the plaintiff had given Thorp permission to sell the wheat raised during the year 1886 was very strong, consisting of the deposition of Thorp himself and of evidence of the statements made by the plaintiff under oath while testifying as a witness in the previous trial of his action against Thorp. This being so, the exclusion of this item of irrelevant evidence could scarcely have changed the result.

III. The court permitted the defendant to show, by the testimony of James R. Wells, that in 1886 Thorp was indebted to Wells, for which indebtedness the defendant was surety for Thorp, and that defendant had paid him, Wells, a part of the debt. We see no error in this. It tended to show that, to the extent to which the plaintiff had discharged the debt of Thorp, Thorp was indebted to him. It was, therefore, relevant as tending to show that Thorp had turned over the wheat to the defendant in the discharge of a *bona-fide* indebtedness.

IV. The plaintiff requested the court to give the following instruction:

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"The court instructs the jury that the defendant admits that he received the sum of three hundred and eighty dollars, arising from the sale of the wheat crop raised on the plaintiff's farm in 1886, by one Gordon A. Thorp, the tenant of plaintiff; and defendant also admits that he purchased said wheat from said Thorp. The court, therefore, instructs the jury that, if they find from the evidence that the sum of five hundred dollars for the rent of said farm for 1886 remained due and unpaid by said Thorp to plaintiff, and said rent became due at any time within eight months prior to the purchase of said wheat by defendant,—then the plaintiff had a lien on said wheat, at the date of said purchase, to secure his said rent; and the verdict of the jury should be for plaintiff, against defendant, for the said sum of three hundred and eighty dollars, with six per cent. interest thereon, from the fourteenth day of Aaugust, A. D., 1886."

The court refused to give this instruction as asked, and gave it as thus qualified:

"Unless defendant has shown to the jury, from the evidence in the cause, that, prior to the sale of said wheat, the plaintiff agreed with such tenant to waive his lien thereon, if said tenant should sell said wheat, and that, under and on account of such agreement and permission of plaintiff, the said tenant did sell said wheat, or any part thereof to defendant."

The court also, at the request of the defendant, instructed the jury as follows:

"If the jury believe, from the testimony in the case, that plaintiff, prior to the sale of the wheat crop, harvested in the year 1886, gave his tenant, Gordon A. Thorp, permission to sell said wheat, and intended thereby to waive a lien, and to look to Thorp for the payment of the rent, then the verdict will be for the defendant."

We see no error in the qualification which the court added to the plaintiff's instruction, or in the instruction

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given at the request of the defendant. The two instructions, as given, submitted to the jury the real issue in the case. We see no force in the argument that the waiver, if made, was not a waiver, because it was not founded on a valuable consideration. A consideration such as is necessary to support a contract is not necessary to support a waiver. A waiver may often take place in consequence of laches merely, or in consequence of acting inconsistently with the idea of insisting upon the right which is waived. This is a familiar branch of legal doctrine, which not only arises in cases of insurance, but in many other cases. If in fact the plaintiff consented that Thorp should go on and sell the wheat, as he had allowed him to do in previous years, and if the defendant knew this fact, as the evidence tends to show that he did, it would be very unjust towards the defendant to allow the plaintiff to change position and to recover the value of this wheat from the defendant.

On the whole, we see no error in the record of which the plaintiff can justly complain, and we accordingly affirm the judgment. All the judges concur.

31	41
36	338
31	41
41	579
31	41
44	104

R. J. McKINNEY *et al.*, Respondents, v. JOHN W. HARRAL, Appellant.

St. Louis Court of Appeals, May 8, 1888.

FORCIBLE ENTRY AND DETAINER — DESCRIPTION — JURISDICTION.— A petition in forcible entry and detainer which fails to show that the land claimed is in the county where the suit is brought, or in the state of Missouri, is fatally defective, and the omission cannot be cured by evidence at the trial. The justice had no jurisdiction of the cause, and the circuit court acquired none upon *certiorari*.

APPEAL from the Iron Circuit Court, HON. JOHN L. THOMAS, Judge.

Reversed and remanded.

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B. ZWART, for the appellant: The justice of the peace did not obtain jurisdiction of the cause, as it does not appear from the complaint, or from any other part of the record, that the land lies in Iron county, or even in the state of Missouri. The complaint is fatally defective Rev. Stat., sec. 2422; *McQuoid v. Lamb*, 19 Mo. App. 153; *Hansberger v. Railroad*, 43 Mo. 196; *Iba v. Railroad*, 45 Mo. 470; *Haggard v. Railroad*, 63 Mo. 303; *Rohland v. Railroad*, 89 Mo. 180, 183; *Gideon v. Hughes*, 21 Mo. App. 528. The defect was not supplied by reference in the complaint to Wm. J. Reid, Jr., survey number 2173, for it is not a congressional subdivision of land, but a mere private survey and not legal evidence in any court in this state. The statute authorizing the summary proceeding of forcible entry and detainer, requires the complaint to be in writing, and that it "must specify" the land. Rev. Stat., sec. 2423; *Lamme v. Buse*, 70 Mo. 463, 465. Nothing can be presumed in favor of the jurisdiction of inferior courts. Rev. Stat., secs. 5236, 5276; Campbell's Atlas Mo., Maps 31 and 27. Jurisdiction of a justice's court will not be presumed on appeal or *certiorari*, where the transcript fails to show jurisdictional facts. Nothing is presumed which does not appear on the record. *McQuoid v. Lamb*, 19 Mo. App. 153; *Gideon v. Hughes*, 21 Mo. App. 528. *Certiorari* performs no other office than to remove the case pending before the justice to the circuit court; and as the justice had no jurisdiction of the case, the circuit court did not obtain jurisdiction of the case, and the whole proceedings are void. *McQuoid v. Lamb*, 19 Mo. App. 155, 156; *Railroad v. State Board*, 64 Mo. 308; *Robinson v. Walker*, 45 Mo. 120. As the jurisdiction does not appear from the complaint, or from the return, or the transcript, or any part of the record, the objection of want of jurisdiction may be raised for the first time, in the Supreme Court. *Barnett v. Railroad*, 63 Mo. 57, 65; *Abernathy v. Moore*, 83 Mo. 63, 69; *Shell v. Leland*, 45 Mo. 290, 294.

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Dinning & Byrns, for the respondent: Forcible entry and detainer in no way affects the title to the premises in dispute. *Beeler v. Cordwell*, 29 Mo. 72; *Krevet v. Meyer*, 24 Mo. 107; *Harvie v. Turner*, 46 Mo. 444. The complaint in this case does specify the land in controversy, and locates it in Iron county, Missouri. *Silvey v. Summer*, 61 Mo. 253; *Tipton v. Swain*, 47 Mo. 98; *Walker v. Harper*, 33 Mo. 592; *Kennedy v. Pruitt*, 24 Mo. App. 414. It is not necessary that the complaint should in terms aver that the land is situated in Iron county, Missouri. It is sufficient to prove that fact on the trial. The proof in this case showed that the land in question was situated in Iron county, Missouri. The description in the complaint locates the land in question in the north part of the Wm. Reed, Jr., survey number 3173, in township thirty-five, north of range three, east. If the description here did not locate the land in the Wm. Reed, Jr., survey, this court would take judicial notice that the land in question was either in Iron or Washington counties, as township thirty-five, range three, east, is divided by the boundary line between said counties. Rev. Stat., 1879, secs. 5236, 5276; *Long v. Waggoner*, 47 Mo. 178. The description locating this land as a part of the Wm. Reed, Jr., survey, as aforesaid, authorized the plaintiff, in order to maintain his complaint, to prove that the Wm. Reed, Jr., survey was located in the county of Iron, in the state of Missouri, which proof was made at the trial. *Silvey v. Summer, supra; Kennedy v. Prewitt, supra.* The Wm. Reed, Jr., survey, number 3173, is a United States public survey, and the court will take judicial notice that it is located in Iron county, Missouri. The appellant refusing to appear at the trial and after judgment appealing this case, bringing up alone the record at the common law, can gain no advantage thereby.

Peers, J., delivered the opinion of the court.

This is an action under the statute (Rev. Stat., sec.

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2419) of forcible entry and detainer, commenced before a justice of the peace of Iron county, and transferred to the circuit court of said county by a writ of *certiorari*, pursuant to the provisions of section 2459, Revised Statutes.

On trial in the circuit court the defendant made default, and the plaintiffs had judgment for the possession of the land in controversy and thirteen dollars damages, the monthly rents being fixed at twenty-five cents, from which judgment the defendant appeals to this court.

The record before us contains no bill of exceptions, and fails to show whether any such bill was tendered to, or signed by, the trial court.

The petition described the land as "part of the north part of Wm. Reed, Jr., survey number 3173, township thirty-five, north of range three, east, beginning in the channel of Huit's Creek, on the northern boundary of said survey number 3173, thence west," etc., describing the land minutely and particularly by metes and bounds. It is not alleged in the petition that the land is in Iron county, or in the state of Missouri, and the defendant contends that such omission is fatal to the proceedings; that the petition failing to state that the land was in "Iron county, Missouri" (in addition to the description contained in the petition), is such a defect as went to the jurisdiction of the justice before whom the case originated, and that the jurisdictional question can be raised here for the first time.

The whole matter before us hinges on the proposition whether in these proceedings it is necessary, as a jurisdictional fact, that the county and state where the land is situated must be averred, or whether "survey number 3173, township thirty-five, range three, east" is a sufficient description to not only confer jurisdiction, but also upon which to base a judgment and by which the land could be identified.

Plaintiffs insist that great strictness and accuracy

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in this character of complaints has not heretofore been required, and cite *Tipton v. Swayne*, 4 Mo. 98, where the premises were described as "one house and one garden"; also to *Walker v. Harper*, 33 Mo. 592; *Kennedy v. Pruitt*, 24 Mo. App. 414; and *Silver v. Summer*, 61 Mo. 213. After a careful examination of these cases we are satisfied that they do not apply to the question raised here. In the case at bar no congressional subdivision of land is described, neither county nor state named in the complaint, nor does the jurisdiction appear from the return on the transcript or any part of the record, reference only being made to the survey, township, and range.

Chapter thirty-three, Revised Statutes, on which this proceeding is founded, vests exclusive jurisdiction in the justices of the peace of the county in which the detainer is committed, and prescribes that the land must be "specified" in a written complaint, verified by affidavit, etc. The complaint in this case does not "specify" the land as lying in Iron county within the jurisdiction of the justice; it does not even appear to be in the state of Missouri, and there is no averment by which it can be implied that the forcible entry was committed within the jurisdiction of the justice of Iron county. It is said to be a part of a survey, but whether that survey is in Iron or Washington county does not appear. The complaint does say that the survey is in township thirty-five, north of range three, east, but this does not aid us; for, on examination of the boundary lines of Washington county (Rev. Stat., sec. 5276) we find that within Washington county lies the greater part of land in township thirty-five, range three, east.

We cannot assume that the survey is in Iron county, for in looking up the boundary lines of Iron county (Rev. Stat., sec. 5236) we find no mention therein made of any such survey constituting any part of that county. We are of the opinion that the complaint is defective in not alleging the necessary jurisdictional

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facts. Complaints of this character should aver in explicit terms the *locus in quo* of the premises in order to show affirmatively that the lands are in the county where the complaint is brought, and unless this does appear the justice has no jurisdiction, and the circuit court can acquire none by *certiorari*, for this writ performs no other office than to remove the case pending before the justice to the circuit court. As the justice had no jurisdiction in the case, the circuit court did not obtain jurisdiction, and the whole proceeding is void. *McQuoid v. Lamb*, 19 Mo. App. 155, 156; *Han. & St. J. R. R. Co. v. St. Board*, 64 Mo. 308. Plaintiff urges upon us, that the defect in the complaint was cured by the evidence introduced in the court below. As we have not the evidence before us, we are not at liberty to determine that question. We are unable to see, however, how the jurisdictional defect in the complaint could be cured by evidence in the circuit court. If the justice had no jurisdiction the circuit court acquired none by the transfer. If this had been an original proceeding in the circuit court, and the testimony was preserved in a bill of exceptions, the position might be a correct one, but as the circuit court in this class of cases has no original jurisdiction it could acquire none by removal provided the justice before whom the suit was brought had none, and *evidence* could not supply the defect.

We may with propriety question the practice of refusing to appear at the trial of a cause, and quietly standing by let judgment go by default, then appealing and bringing up the record alone on purely technical grounds, as not the best means of subserving the ends of justice, especially in matters where so little is involved as in the case before us, and where the judgment on the merits seems to be for the right party.

But, while the jurisdictional fact is not, and cannot be, cured by evidence, yet we see no good reason why under the statute (Rev. Stat., sec. 3060) and the ruling

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in *Mitchell v. Railroad*, 82 Mo. 106; and *Vaughn v. Railroad*, 17 Mo. App. 4, 8, the jurisdictional defect here complained of may not be supplied by amendment in the circuit court.

To the end that such amendment may be made, the judgment will be reversed and the cause remanded. All concur.

ISIDOR BUSH, Respondent, v. HERMAN A. HAEUSSLER, Appellant.

St. Louis Court of Appeals, May 8, 1888.

1. ACTION AT LAW—COMPENSATORY DAMAGES.—Where the defendant gave a written acknowledgment that the title of certain real estate was held by him in trust to indemnify the plaintiff against liability as surety for a third person on an appeal bond, with an undertaking to devote the property or its proceeds to such indemnification, a suit by the plaintiff on account of the defendant's sale of the property and diversion of the proceeds, in consequence whereof the plaintiff was compelled to satisfy the appeal bond without indemnity, is an action at law, and the plaintiff's recovery can be of compensatory damages only.

2. EVIDENCE—MATTER NOT IN ISSUE.—Evidence tending to show that the defendant did not derive any benefit from his sale of the property in derogation of his indemnifying undertaking, was properly excluded as irrelevant, the ground of action being the plaintiff's loss, and not the defendant's gain.

3. EVIDENCE—VALUE OF PROPERTY.—Evidence offered by the defendant to show the value of the property held by him for the plaintiff's indemnification at the time when the plaintiff's right of action accrued, was erroneously excluded.

4. MEASURE OF DAMAGES—INSTRUCTION.—An instruction that the measure of the plaintiff's damages was the net proceeds, after proper deductions, of the defendant's sale of the property held by him for the plaintiff's indemnification, with interest, was erroneous. The true measure of damages was the market value of the property at the time when the plaintiff became entitled to have it sold for his benefit. The defendant was not chargeable with interest from the date of his sale, since there was no undertaking for rents or issues of the property.

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5. **Consent to Sale — Knowledge of Facts—Instruction.—An instruction to the effect that the plaintiff was not bound by any consent given by him to the sale made by the defendant, if such consent was obtained by an incorrect statement of the facts of such sale, or was given without a full knowledge by the plaintiff of all the material facts affecting his interests therein, was erroneously given. The defendant could not be held responsible for any incorrect statements not made by himself, or for the plaintiff's ignorance arising from other causes.**

Appeal from the St. Louis Circuit Court, Hon. Leroy B. Valliant, Judge.

Reversed and remanded.

Cecil V. Scott, for the appellant: This action is plainly an action at law for damages for the breach of a contract, and not a suit in equity to compel the defendant to execute a trust, or to compel him to account, as trustee, for moneys received by him in a trust relation. *Bush v. Haeussler*, 26 Mo. App. 265, 276. The breach of defendant's agreement arose when he was requested by plaintiff to sell the property, and for any reason neglected or refused so to do. The measure of damages on the breach of a contract are the damages which are naturally and actually sustained from the breach itself. *Hughes v. Hood*, 50 Mo. 350. Plaintiff's second instruction is clearly erroneous. It is error to submit issues which do not arise under the pleadings or which are not supported by proof. *Kennedy v. Klein*, 19 Mo. App. 17; *Kennedy v. Railroad*, 70 Mo. 243, 254; *Stone v. Richmond*, 21 Mo. App. 17; *Melvin v. Railroad*, 89 Mo. 106; *Rothschild v. Frensdorf*, 21 Mo. App. 318; *Bank v. Overall*, 16 Mo. App. 510; s. c., 90 Mo. 410; *Skyles v. Bollman*, 85 Mo. 35; *White v. Chaney*, 20 Mo. App. 389. The meaning of the phrase "material facts," if used in an instruction, should be explained to the jury, and its application defined. What are material facts in a case is a question of law. *Digby v. Ins. Co.*, 3 Mo. App. 603. This instruction is also objectionable,

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in that it is too general and misleading, and further it incorrectly states the law applicable to the facts. Plaintiff's third instruction states the measure of damages erroneously.

GEO. W. TAUSSIG and M. N. & LEE SALE, for the respondent: The measure of damages as declared in plaintiff's instruction number three was unquestionably correct. Plaintiff was entitled to recover, if at all, the sum realized from the sale of the property, together with legal interest thereon. *Bush v. Haeussler*, 26 Mo. App. 271. "Where money has been wrongfully acquired or detained, interest is to be computed from the time of the wrongful acquisition or detention." 2 Sedgwick on Dam. 176. "If the defendant has derived an advantage from the money [had and received], or committed some wrong in obtaining or disposing of it, or is in default in not paying it over, he will be charged with interest." 1 Sutherland on Dam. 621; *Rapelie v. Emory*, 1 Dal. 374; 1 Sutherland on Dam. 623; 2 Sedgwick on Dam. 176; *Crane v. Thayer*, 18 Vt. 162; *Commonwealth v. Crevor*, 3 Binn. (Pa.) 121; *Bobb v. Bobb*, 89 Mo. 411; 1 Perry on Trusts, 593, 594. "In awarding compensation to the *cestui que trust* for a breach of trust by the trustee, the court does not regard it as material that the trustee has made no profit or advantage out of the estate." 2 Perry on Trusts, sec. 847; *Dornford v. Dornford*, 12 Ves. 129; *Rapall v. Boehm*, 13 Ves. 407; Lewin on Trusts [8 Ed.] 907. The duty of a trustee to keep his beneficiary informed of the facts affecting his interests is well established. *Heath v. Waters*, 40 Mich. 457. And where it is claimed that a *cestui que trust* has acquiesced in an act which constitutes a breach of trust, it must appear that he did so, with full knowledge of the facts and circumstances, and the trustee must be free from all suspicion of misrepresentation or concealment. *Munch v. Cockerell*, 5 Myl. & Cr. 178; *Montfort v. Cadogan*, 17 Ves. 489; *Adair v. Brimmer*, 74 N. Y.

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539. Again, we contend that the declaration of trust vested in plaintiff the beneficial interest in the property. *Ex parte Pye*, 18 Ves. 149; *Gee v. Lindell*, 35 Beav. 621. And that the release of this interest cannot be established by parol. Rev. Stat., 1879, sec. 2511; Perry on Trusts, sec. 79, p. 65; *Smith v. Burnham*, 3 Sumn. 435. At all events, it is well settled that an oral agreement by a beneficiary to release his interest must be established beyond a reasonable doubt. *Stevenson v. Adams*, 50 Mo. 475.

Rombauer, P. J., delivered the opinion of the court.

The Bank of Commerce, January 20, 1881, recovered a judgment against Gustavus Hoeber for $4,720.94. The defendant, who was Hoeber's attorney at that time, held the legal title to the real estate hereinafter mentioned as grantee of Hoeber, incumbered by a mortgage of five thousand dollars, and certain other trusts, which other trusts, prior to the sale hereinafter mentioned, became satisfied. Hoeber, desiring to appeal from the judgment thus rendered against him, requested the plaintiff and one Mrs. Augustine to sign his appeal bond as sureties, promising to indemnify them against loss. The plaintiff thereupon signed the appeal bond, and Hoeber through defendant delivered to him as indemnity a non-forfeitable life policy for ten thousand dollars, on his, Hoeber's, life. According to defendant's claim this was to be the sole indemnity agreed upon; according to plaintiff's claim he was to have further indemnity. This fact, however, is immaterial, as it is conceded that the real estate hereinafter mentioned was also to be reserved as a fund for the indemnity of Hoeber's sureties with Hoeber's consent, the only substantial controversy being whether it was to be reserved as a fund for the indemnity of both sureties on the bond, or as a fund for the indemnity of Mrs. Augustine alone.

These being the surrounding circumstances the

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defendant, March 4, 1881, executed and delivered to plaintiff the following declaration of trust:

"I, Herman A. Haeussler, do hereby certify that I hold the title to the following described real estate, to-wit:

"Lots four and five, block three, of Dillon's addition to city of St. Louis, now city block four hundred and seventy-eight, south, being fifty feet on the west side of St. Ange avenue, by one hundred and twenty-seven feet, six inches to alley, and upon which is deed of trust for five thousand dollars, said lots being in city of St. Louis.

"Lot nineteen in subdivision of public school lands, situated in section twenty-two, township forty-five, range six, containing seven and fifty-three hundredths acres, in St. Louis county, Mo.

"The interest in this property conveyed to me by Gustavus Hoeber and wife, I hold in trust to indemnify Isidor Bush and Mrs. Margaret Augustine, who have become securities for said Hoeber on an appeal bond given in case No. 52,289, circuit court, city of St. Louis, wherein Bank of Commerce is plaintiff and Gustavus Hoeber is defendant, in order to perfect appeal to St. Louis Court of Appeals, and who, in event of affirmance in said court, have agreed to sign bond to perfect appeal to Supreme Court.

"Now, if said Hoeber shall hold said Bush and Augustine harmless from any and all liability as his security on either said bond given, or to be given, then I am to re-convey to said Hoeber, otherwise to sell said property and apply proceeds to payment of said judgment in such manner as said Bush and Augustine may order and direct.

"In witness whereof I have hereunto set my hand and seal this fourth day of March, A. D. 1881.

"HERMAN A. HAEUSSLER. [Seal]"

On the eleventh of July, 1882, while Hoeber's appeal was pending, the defendant conveyed at Hoeber's

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request and with the consent of Mrs. Augustine, but according to the jury's finding without the consent of the plaintiff, the two lots in block three of Dillon's addition, realizing on said sale a net surplus of fifteen hundred dollars. This amount was paid by the purchaser to Hoeber, and has since been wholly lost by speculations of Hoeber, who is admittedly insolvent.

The judgment against Hoeber hereinabove mentioned was, after the lapse of years, affirmed by the Supreme Court, and the plaintiff, on April 8, 1886, was compelled to pay, and did pay, the Bank of Commerce the sum of $7,324.35, principal, interest, and costs of said judgment, and thereafter instituted the present action against the defendant.

The plaintiff's petition, after setting out the facts herein stated and averring among other things that the sale of the lots in Dillon's addition were made by the defendant and a surplus of two thousand dollars, received by him from the proceeds of the sale, concludes thus:

"That the said defendant Haeussler, without the knowledge or consent of this plaintiff, did afterwards, to-wit, on the —— day of July, 1882, wrongfully pay over and deliver the said sum so realized to the said Gustavus Hoeber; that, by reason of the said wrongful act of the defendant, all the right, title, and equity of the plaintiff in and to the said real estate have been wholly lost, to the damage of the plaintiff in the sum of two thousand dollars, for which sum he asks judgment, with interest and costs."

The defendant by answer took issue on the allegations of the petition, but the jury, under the instructions of the court, found the issues for the plaintiff and rendered the following verdict:

"We the jury find for the plaintiff, and assess his damages at $1,983.75, and costs, being the principal of fifteen hundred dollars, with interest at six per cent., from July 15, 1882, to date."

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The defendant appealing presents numerous exceptions to the rulings of the court. We shall only notice those which we consider well taken, as a discussion of other exceptions would render this opinion unnecessarily lengthy without subserving any useful purpose in the retrial of the cause.

When the case was last before us on a demurrer to plaintiff's petition, which the court had erroneously sustained, we stated in the opinion reversing the judgment of the trial court, among other things: "The action is plainly an action at law for damages for the breach of a contract, and the allegation in the petition, that the plaintiff notified the defendant that Hoeber and his sureties in the appeal bond had failed to indemnify the plaintiff for the money expended by him as alleged, and that the plaintiff had requested the defendant to sell the property and apply the proceeds of it in payment of the judgment in conformity with the agreement which is the foundation of the action, is mere matter of inducement to the statement of the breach of the contract which follows. There is nothing repugnant in the allegations that the defendant refuses to execute the contract, and that he has broken the contract, or done something which disables him from performing it according to its terms." 26 Mo. App. 271.

This was then and is now unquestionably correct. The action is one at law and was tried and determined as such. If so, it necessarily follows that plaintiff's damages are purely compensatory in their character, and the case admits of only two inquiries: (1) Was defendant guilty of a breach of the contract? (2) What are the proximate damages resulting to plaintiff from such breach? Rules which govern the accountability of trustees to their beneficiaries in courts of conscience, and which subject the trustee frequently to punitive and highly penal damages for a violation of trust duties can have no application to such a case, and the cases cited by plaintiff on that subject are on a question outside of this record.

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Keeping this distinction in view, we proceed to the examination of the rulings of the court in that connection. The defendant offered to show that he never received any benefit from the sale, and neither received nor used the surplus resulting therefrom. The court rightfully excluded this evidence, because the wrong of which plaintiff complains is the unauthorized sale of the property, and not the use of its proceeds by the defendant. On a question of compensation to plaintiff for such wrong, it was immaterial whether the defendant used such proceeds or not. But the defendant further offered to show the value of the property in 1886, when the plaintiff's right to have the same sold for his indemnity first accrued, and the court excluded that evidence likewise, which was clearly error.

On the question of the measure of damages, the court instructed the jury as follows:

"3. The court instructs the jury that if the jury find in favor of plaintiff, then the jury should assess as damages such sum as the jury find, from the evidence, was derived from the sale of the realty to Morschel (after deducting the debt secured by the deed of trust, and interest thereon, taxes and commissions, testified to as having been paid), together with interest at the rate of six per cent. per annum from July 15, 1882."

This was in conformity with its rulings on the evidence as above stated, and was likewise error.

The plaintiff is entitled to recover not what the defendant or Hoeber made, but what he lost by the sale if unauthorized. *Prima facie*, as against the defendant, the amount for which the property sold in 1882, was its reasonable market value, but there is no presumption as to the continuance of such value up to 1886, and even if there were, the defendant was clearly entitled to rebut such presumption by positive evidence. The plaintiff's right to have the property sold for his indemnity first accrued in 1886. If the property had appreciated in value in the meantime, he was entitled to the benefit of such appreciation; if it depreciated in

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value, the loss was his. The defendant was under no obligation to sell the property before a failure on the part of Hoeber to repay the plaintiff whatever plaintiff may have lost by reason of his suretyship. Such failure, in this case, did not occur till 1886. On what principle plaintiff's damages can be greater, because the defendant has violated his contract, than the benefit he would have derived if the defendant had faithfully kept his contract in all things, it is difficult to conceive, keeping in view the fact that the action is one for compensatory damages only.

This view derives additional force from the uncontroverted fact that the rents and issues of this property were never pledged. At the date of the declaration of trust Hoeber occupied the property as his homestead. There is no intimation in the evidence that he was to be accountable for rents, or that it was contemplated by any one that he was to cease to occupy the property before the termination of the litigation. The interest from 1882 to 1886, with which the defendant stands charged in this proceeding can at most be upheld only by viewing it as a substitute for the rents and issues of the property, a substitute for another thing with which the defendant was not chargeable in any event.

For error in excluding the testimony offered by the defendant as to the value of the property in 1886, and in the instruction touching plaintiff's measure of damages, the judgment must be reversed.

We may state in addition that defendant's exception to the second instruction given on behalf of plaintiff is also well taken. That instruction is as follows:

"2. The court instructs the jury, that even if the jury believe from the evidence that plaintiff Bush did, in July, 1882, give his consent to the sale of the property described in the deed of Haeussler to Morschel, and to the payment of the surplus to Hoeber, yet, if the jury believe from the evidence, that such consent was obtained from plaintiff by an incorrect statement of the

facts of such sale, or that such consent was given without a full knowledge by plaintiff of all the material facts affecting the interests of plaintiff in such sale, then such consent is not binding upon the plaintiff, and is no bar to his recovery."

There is nothing in plaintiff's petition or evidence to support this instruction. The plaintiff contends throughout that he was not informed of the sale until long after its consummation. If the instruction was offered on the theory of meeting defendant's evidence, to the effect that he did inform plaintiff of the sale prior to its consummation, then it is objectionable because there is no evidence that the defendant made to plaintiff an incorrect statement of the fact of the sale. Nor can that part of the instruction be defended which renders the defendant liable if he obtained plaintiff's consent without a full knowledge on plaintiff's part of all the material facts affecting the interests of plaintiff in such sale. The defendant is liable for a suppression or misstatement of facts, if any, but cannot be held responsible for plaintiff's ignorance of the facts resulting from other causes.

We may also add that plaintiff's measure of damages, should he show himself entitled to a recovery upon a re-trial of the cause, is the value of the property in 1886, when his cause of action against the defendant first accrued, less the sum of five thousand dollars. This results in our opinion from the following consideration. The defendant's declaration of trust recites an incumbrance on the property of five thousand dollars, and no more. As he was under no obligation to discharge that or any part thereof, he is entitled to the presumption that such incumbrance would have continued. On the other hand as the defendant by his own act has rendered it impossible to determine whether such incumbrance would have increased by the accumulation of interest, or taxes, if he had retained the title to the property till 1886, no presumption can be indulged in

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his favor that the incumbrance would have thus increased, and any testimony to that effect would have to be rejected as based on mere conjecture.

All the judges concurring, the judgment is reversed and the cause remanded.

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STATE OF MISSOURI, Respondent, v. JOEL COOK, Appellant.

St. Louis Court of Appeals, May 8, 1888.

1. APPEAL—DISMISSAL.—It is error to dismiss an appeal from a justice of the peace, in a criminal proceeding, and to strike the cause from the docket, on the ground that no recognizance was given and no appeal perfected, when the appellant had filed with the justice an affidavit for an appeal, and appears in the circuit court before the determination of the motion to dismiss, tendering a sufficient recognizance and asking for a trial.

2. APPEAL—JUDGMENT ON VOID RECOGNIZANCE.—A judgment against the surety in an appeal recognizance, when the court at the same time refuses to accept the recognizance and denies the existence of an appeal, is irregular and void.

APPEAL from the New Madrid Circuit Court, HON. W. H. MILLER, Special Judge.

Reversed and remanded.

WILSON CRAMER, for the appellant: The statute relating to appeals from justices of the peace, in cases of misdemeanor (Rev. Stat., sec. 2058), provides that defendant "may appeal if he shall immediately, after judgment is rendered, file his affidavit, stating that he is aggrieved by the verdict and judgment in the case, and that he does not make his appeal for vexation or delay, and shall also enter into a recognizance," etc. It is the filing of the affidavit, which was done in the case at bar,

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immediately after the judgment, that transfers the jurisdiction. The bond simply stays the execution of the judgment. Rev. Stat., sec. 2058; *State v. Anderson*, 84 Mo. 524; *State v. Harmon*, 20 Mo. App. 548; *State v. Clevenger*, 20 Mo. App. 626.

RILEY & ARNOLD, for the respondent.

PEERS, J., delivered the opinion of the court.

This is a prosecution begun before a justice of the peace under section 1483 of the Revised Statutes, against defendant as mayor of the city of New Madrid, for alleged oppression and partiality in office. Defendant was convicted before the justice, and immediately upon the return of the verdict presented his affidavit for an appeal to the circuit court. In answer to a rule made on him the justice filed with the circuit court a transcript showing the conviction of the defendant and the fact that the affidavit for an appeal was presented immediately thereafter. This was at the March term, 1887; defendant was personally present in court, and it appearing that he had failed to enter into a recognizance before the justice for his appearance in the circuit court, he at once, upon the filing of the transcript, tendered in open court his recognizance in the sum of one hundred dollars, in due form and with good and sufficient securities, and filed the same with the clerk of the court. During the same term the state filed a motion to strike the cause from the docket and remand the same to the justice for the following reasons: (1) There was a final judgment rendered against the defendant for a fine of ten dollars in the court below, and the defendant took no appeal therefrom. (2) The justice before whom said cause was decided did not grant an appeal. (3) Neither at the time of the rendition of the judgment by the justice nor at any time since did the defendant present any bond or recognizance for appeal according to the statutes in such cases made and provided.

Nothing was done with the motion at the March

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term. At the next term,—September, 1887,—defendant again appeared in person and the motion to strike the cause from the docket was taken up. On behalf of the state nothing was offered in evidence excepting the justice's transcript, which shows the conviction and the filing of the affidavit for appeal, but is silent as to the granting of an appeal or the giving of bond. Defendant on his part made the following showing as set forth in the bill of exceptions:

Defendant offered evidence tending to show that at the March term, 1887, of said circuit court, upon answer being made by said justice of the peace to the rule served upon him, that he tendered in open court his appeal bond in the sum of one hundred dollars, in due form of law and with good and sufficient sureties, and that said bond was then and there deposited with the clerk of said court for filing, and had ever since remained with the papers in the cause; and further there was evidence going to show that the defendant was in attendance at each term of the circuit court held since the filing of his affidavit for an appeal in the court below.

This was all the evidence in the cause. Thereupon, and before said motion was submitted, defendant again tendered his appeal bond and prayed the court to receive and approve the same, and although said bond was solvent and sufficient in form and amount the court refused to accept and approve the same because it was presented out of time.

The motion was submitted to the court and by the court in all things sustained. Defendant excepted and brings the cause here by appeal.

The record shows that this cause was treated and tried in the circuit court of New Madrid county as an appeal from the justice, and we are not justified, in the face of that record, in saying that there was no appeal. The record upon this point says: "Record and proceedings in the circuit court of New Madrid county, in the state of Missouri, in the case of the State of Missouri *vs.* Joel Cook, on a charge of oppression in office; on

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appeal from James Stewart, justice of the peace"; and again: "Now at this day come the parties, by their respective attorneys, and plaintiff's motion to dismiss the appeal herein coming on to be heard * * * and by order of court the appeal is dismissed, and that plaintiff have and recover of defendant and Louis Block, the security in the recognizance, the costs and charges in this court as well as the court below, and have execution therefor."

We are led by this record to the inevitable conclusion that there was an appeal pending in the circuit court from the judgment of the justice in this cause. It seems that no appeal bond was given, but the defendant appeared in open court and tendered his bond and asked that the same be approved before the motion to dismiss was sustained.

The court sustained the motion to dismiss and entered judgment for costs against the principal and the security in the same bond it refused permission to file, the filing of which would have perfected the appeal. If the cause was dismissed for want of an appeal bond, upon what reasoning is the court justified in rendering judgment on the bond treated by the court as a nullity? If for no other cause, this judgment would have to be reversed on that ground. But from the record we can only conclude that the cause was in the circuit court of New Madrid county on appeal from the justice of the peace, and being so in the possession of the court, the appeal ought not to have been dismissed. The defendant was present in court and submitted himself to the jurisdiction of the court, and when the suggestion was made that there was no appeal bond, which was before the dismissal of the appeal, he tendered a sufficient bond, good in form and unobjectionable so far as the bondsmen were concerned. Section 3053, of the Revised Statutes, provides that: "No appeal allowed by a justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance made or given is defective or insufficient, if the appellant, or

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some person for him, will, before the motion to dismiss is determined, file in the appellate court the affidavit required, or enter into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission with respect to such affidavit or recognizance."

It would be inconsistent, if not absurd, to say that a judgment could be rendered on a bond against the principal and sureties which had been given to perfect an appeal, and that the appeal was imperfect because of the irregularity of the bond either as to the date of filing or otherwise.

The strict construction placed upon the proceedings of the trial court are not in harmony with the spirit of the statute. *State v. Thompson*, 81 Mo. 163.

To the defendant, who by the judgment is precluded from holding any office of honor, trust, or profit in this state, or voting at any election, this is a matter of serious importance, and we are unwilling to deprive him of a trial, on appeal, by the rigid construction applied to the statutes by the circuit court.

The judgment is reversed and the cause remanded, with directions to the circuit court of New Madrid county to approve the appeal bond offered, if solvent and sufficient in form, and to proceed with the trial of the cause. All concur.

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M. L. McCLUER, Appellant, v. HOME INSURANCE COMPANY OF NEW YORK, Respondent.

St. Louis Court of Appeals, May 8, 1888.

INSURANCE—WAIVER OF CONDITION.—A contract of insurance included a stipulation that the defendant company should not be liable for any loss or damage that might occur while any premium note remained past due and unpaid. After a loss, which occurred while the premium note remained past due and unpaid, the defendant's agents examined and adjusted the amount of the loss, notified the insured plaintiff thereof and received from him the amount due on the premium note, which was thereupon cancelled and returned to the maker. *Held:* The question whether there was a waiver by the insurer of the stipulated effect of the nonpayment of the premium note should have been submitted to the jury, and the court erred in sustaining a demurrer to the evidence.

APPEAL from the Greene Circuit Court, HON. JAMES R. VAUGHAN, Judge.

Reversed and remanded.

GOODE & CRAVENS, for the appellant: There are two classes of cases in which the doctrine of waiver of forfeiture incurred by default in the payment of premiums has been considered: (1) Where the contract provides that upon default in the payment the whole of the premium shall be deemed due and earned. In these cases the acceptance by the company of a past-due premium after loss has occurred, does not waive the forfeiture; and this for the very obvious reason that it is taking no more than it is entitled to, because by express agreement the premium is all earned. (2) Where the contract does not contain this provision. In these cases the courts have invariably held the forfeiture waived by acceptance of the premium after loss. *Williams v. Ins. Co.*, 19 Mich. 451; *Joliffe v. Ins. Co.*, 39 Wis. 111. The

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case at bar falls in the second class, but is a little stronger even than most of that class. For not only is there no provision that upon default in payment the whole premium shall be considered earned, but a clear provision that it shall not be. If an insurance company receives and retains payment of a past-due premium with knowledge that a loss has occurred, it is estopped to claim any forfeiture which may be provided for in the policy for a default, unless it also provides that in the event of such default the entire premium for the whole time the policy is to run, shall be considered earned. *Joliffe v. Ins. Co.*, 39 Wis. 111; *Smith v. Ins. Co.*, 13 N. W. Rep. 355; *Ins. Co. v. Lansing*, 20 N. W. Rep. 22; *Cohen v. Ins. Co.*, 3 S. W. Rep. 296; *Wing v. Harvey*, 22 Eng. Law and Eq. 140; *Berwick Co. v. Ins. Co.*, 52 Me. 336; *Bennicke v. Ins. Co.*, 15 Otto, 355; *Ins. Co. v. Robertson*, 59 Ill. 123; *Ins. Co. v. Maguire*, 51 Ill. 342; *Benton v. Ins. Co.*, 25 Conn. 542; *Goit v. Ins. Co.*, 25 Barb. 189; *Ins. Co. v. Berrien*, 40 Mich. 147; *Ins. Co. v. Geraldine*. 31 Mo. 30; *Sims v. Ins. Co.*, 47 Mo. 54; *Froelich v. Ins. Co.*, 47 Mo. 406; *Baldwin v. Ins. Co.*, 56 Mo. 151; *Schmidt v. Ins. Co.*, 2 Mo. App. 339. Defendant sent the plaintiff a notice after default, demanding payment, and said nothing about having declared a forfeiture, but rather intimated the reverse. Any provision for forfeiture, whether it be on account of nonpayment of premiums or some other cause, may be and will be waived by the acceptance of the premium after knowledge of the cause of forfeitures. *Combs v. Ins. Co.*, 43 Mo. 148; *Miner v. Ins. Co.*, 27 Wis. 693; *Franklin v. Ins. Co.*, 42 Mo. 456; *Keeler v. Ins. Co.*, 16 Wis. 523; *Ins. Co. v. Hall*, 12 Mich. 214; *Campbell v. Ins. Co.*, 27 N. H. 35; *Marshall v. Ins. Co.*, 27 N. H. 157; *Masters v. Ins. Co.*, 11 Barb. 624; *Phoenix v. Ins. Co.*, 120 U. S. 183; *Ins. Co. v. Woolf*, 95 U. S. 326; *Frost v. Ins. Co.*, 5 Denio, 154; *Hodson v. Ins. Co.*, 97 Mass. 144. The premium note was part of the contract. *Ins. Co. v. Story*, 41 Mich. 385. The acceptance of the premium; the retention of it; the adjustment of the loss;

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sending the draft notifying plaintiff to call for his money, and all the circumstances of this case conclusively show that the defendant, instead of insisting on a forfeiture (which must be done to make it good), completely waived it. *Pechner v. Ins. Co.*, 65 N. Y. 195; *Reynolds v. Ins. Co.*, 47 N. Y. 559; *Blake v. Ins. Co.*, 12 Gray, 265; *Hall v. Ins. Co.*, 6 Gray, 185; *Ins. Co. v. Throop*, 22 Mich. 146; *Frost v. Ins. Co.*, 5 Denio, 155; *Keenan v. Ins. Co.*, 13 Ia. 375.

THRASHER, WHITE & MCCAMMON, for the respondent: That the action of the court was proper is, we submit, amply sustained by the authorities. 1 Greenl. on Evid. [13 Ed.] secs. 275, 276; *Hotel v. Baily*, 3 Mo. App. 598; *Sewing Machine Co. v. Cushen*, 8 Mo. App. 528; *Conn v. McCullough*, 14 Mo. App. 584; *Ins. Co. v. Lansing*, 20 N. W. Rep. 22; *Ins. Co. v. Bowen*, 40 Mich. 147; *Ins. Co. v. Geraldin*, 31 Mo. 30; *Sims v. Ins. Co.*, 47 Mo. 54. The contract was entire. When the risk once commenced the whole premium was due. May on Ins. 302; Hines & Nichols' Ins. Dig. 460, 464; 2 Phillips on Ins. 503, 465, 467; *Hendricks v. Ins. Co.*, 8 Johnson, 1; *Ins. Co. v. Tucker*, 3 Cranch, 357; *Plath v. Ins. Ass'n*, 23 Am. Rep. 691; *Lee v. Ins. Co.*, 3 Gray, 583; *Garver, Adm'r, v. Ins. Co.*, 28 N. W. Rep. 555; *Taylor v. Lowell*, 3 Mass. 335; *Friesmith v. Ins. Co.*, 10 Cush. 589; *Kelley v. Ins. Co.*, 6 Atl. Rep. 740; *Ins. Co. v. Klink*, 65 Mo. 78. The receipt of premium by defendant did not constitute a waiver of any of the conditions of the policy. *Card v. Ins. Co.*, 4 Mo. App. 424; *Dawson v. Ins. Co.*, 1 Mo. App. 317; *Cook v. Ins. Co.*, 70 Mo. 610; *Rothschild v. Ins. Co.*, 62 Mo. 356; *Harle v. Ins. Co.*, 32 N. W. Rep. 396. The adjustment of defendant's loss, and sending draft to agents for plaintiff, constitutes no waiver of the conditions for a suspension of the policy after default in payment of premium note. *Garretson v. Ins. Co.*, 21 N. W. Rep. 781; *Colonius v. Ins. Co.*, 3 Mo. App. 56; *Ins. Co. v. Barnett*, 73 Mo. 364. The policy was suspended

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during the default in payment of premium note, and revived on the payment. The defendant "has the benefit of the temporary suspension of the risk, without any rebate of premium." *Hinckley v. Ins. Co.*, 1 N. E. Rep. 737; *Holly v. Ins. Co.*, 11 N. E. Rep. 507; *Williams v. Ins. Co.*, 19 Mich. 451; *Harris v. Ins. Co.*, 5 N. W. Rep. 124; *Harle v. Ins. Co.*, 32 N. W. Rep. 396; *Russum v. Ins. Co.*, 1 Mo. App. 228; *Moser v. Ins. Co.*, 2 Mo. App. 408.

Rombauer, P. J., delivered the opinion of the court.

This is an action on a fire insurance policy. The trial court instructed the jury at the close of plaintiff's evidence that he could not recover, and this appeal is prosecuted by him from the judgment of the court refusing to set aside the nonsuit which he was compelled to take as a result of the instruction.

The plaintiff urges two exceptions: That the court erred in ruling out certain evidence offered by him, and also erred in withdrawing his case from the jury.

The following facts appeared by the pleadings and evidence: Plaintiff owned a farm on which stood a residence and two barns. He took a policy of insurance on these in the defendant's insurance company, July 1, 1885, for two thousand dollars, distributed as follows: twelve hundred dollars on the residence and four hundred dollars on each of the barns. The policy was to run three years. The premium was twenty-five dollars, for which the assured gave his note payable December 1, 1885. The policy contained the following provision: "It is especially agreed that this company (shall) not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation for the premium remains past due and unpaid." Also the following: "This policy or any indorsement thereof of any kind shall not be valid until countersigned by Ducat & Lyon, managers of the

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western department * * * who alone shall have power or authority to waive or alter any of the terms and conditions of the policy."

On the twelfth of December, 1885, one of the barns burned. At that time the premium note, which was past due, was unpaid. On December 15 plaintiff notified Ducat & Lyon, general managers, of the loss, which letter was received by them on the seventeenth. December 16 he remitted to them the premium, which was received by them December 18. On the last-named day the general adjuster of the company wrote the following letter to plaintiff: "Your report of loss of one barn under No. G. F. 13,514, is received, and shall have the earliest possible attention." On December 23 Ducat & Lyon wrote the following additional letter to plaintiff:

"We have your favor December 16, with remittance of twenty-six dollars, in payment of following premium notes which please find herewith duly cancelled:

"Name, M. L. McCluer,
Amount of Note....................$25.00
No. of Policy, G. F. 13,514, Int.... 1.00

$26.00"

It was also in evidence that upon the receipt of the advice of the loss the general adjuster of the company referred the same for adjustment to John G. Hubble, local adjuster, and the local adjuster thereafter adjusted the loss and made report of his adjustment to the company December 23, accompanying the same with proofs of loss, and that thereupon on December 30, the general adjuster advised the plaintiff that he had forwarded to the agents of the company in Springfield a draft for three hundred and ninety-two dollars, in payment of the loss. This draft was never delivered, as the company refused to pay the loss owing to the fact that at the date thereof plaintiff was in default of payment on his premium note.

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The premium note cancelled and surrendered to plaintiff as above stated was also offered in evidence, and is as follows:

"$25.00. On or before the first day of December, 1885, for value received I promise to pay to the Home Insurance Company of New York, or order (by mail if requested), at their western farm department (Ducat & Lyon, managers), in Chicago, Illinois, twenty-five dollars in payment of the premium of policy No. G. F. 13,514 (issued by the said company at its western department office in Chicago, Illinois), and dated eighteenth day of July, 1885, with interest at the rate of seven per cent. per annum.

"If this note be paid sixty days before maturity all interest shall be waived.

"And it is hereby agreed that if this note be not paid at maturity, said policy shall lapse and be null and void so long as this note remains over-due and unpaid, and in case the earned premium on said policy for the time it was in force be not paid within thirty days of the maturity of this note, according to customary short rates of the company, then the whole amount of this note may be declared earned, due and payable at once, and may be deducted from the amount of said loss.

"(Signed) Marquis L. McCluer."

The first exception, although assigned for error, is not argued by plaintiff's counsel, and we may pass it by with the observation that it is not well taken. The evidence offered was properly excluded because parties cannot show by parol that a promissory note, which by its terms is payable on a day certain, was in fact payable on another day. *Gardner v. Matthews*, 11 Mo. App. 274, 275; *James v. Clough*, 25 Mo. App. 154. Nor was D. M. Evans, the agent of the company, empowered to make any waiver, which, as appears by the contract between the parties, could be made only by the general agents of the company.

The second exception, however, is well taken. The

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evidence above recited was certainly sufficient to submit the question to the jury whether the company by its acts had waived the temporary forfeiture arising from the non-payment of the premium note. The case of *Joliffe v. Ins. Co.*, 39 Wis. 115, is directly in point. The clause under consideration in that case was as follows: "Whenever a promissory note shall be taken for the cash premium, the policy in all such cases shall be issued on the express condition that if said note is not paid within sixty days after the same shall become due, thereafter all obligations of the company to the insured shall be suspended until such time as the said note shall be fully paid." The loss occurred while a portion of the cash premium for which a note had been given remained unpaid, and more than sixty days after such note became due.

The court decided the following propositions: (1) That the provision was inserted in the policy for the benefit of the company, and, therefore, it could waive it; (2) that there could be no recovery on the policy unless the company had waived it, and (3) that by receiving and retaining the whole cash premium and thereby receiving and retaining compensation for the risk covering the time when the loss occurred, it did waive it and cannot be heard to allege that at the time of the loss it had no risk on the property insured; that the acceptance of the full premium after notice of the loss was entirely inconsistent with the claim that the risk was suspended when the loss occurred.

The court concluded that in view of the peculiar terms of the contract the acceptance of the cash premium, after default and notice of the loss, operated as a waiver of the suspension clause therein and rendered the defendant liable on the policy, the same as though the notes for the cash premium had been paid when due.

These views, which seem to be just and fair, are opposed to no decision in our own state. Waiver of conditions before loss have been frequently upheld upon much slighter evidence than in the case at bar (*Sims v.*

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State Ins. Co., 47 Mo. 54; *Froelich v. Atlas Ins. Co.* 47 Mo. 406; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 156; *Schmidt v. Charter Oak Ins. Co.*, 2 Mo. App. 339); and while we are free to say that more persuasive evidence should be required to justify the finding of a waiver after loss than before, the cases are numerous which uphold waivers after loss on substantially the evidence presented in the case at bar. *Farmers' Ins. Co. v. Bowen*, 40 Mich. 147; *Smith v. St. Paul Fire and Marine Ins. Co.*, 13 N. W. Rep. 355; *Phœnix Ins. Co. v. Lansing*, 20 N. W. Rep. 22.

It results that the court erred in withdrawing plaintiff's case from the jury on the evidence offered. Judgment reversed and cause remanded. All concur.

LEWIS LIPPMAN, Appellant, v. EUGENE C. TITTMANN, Administrator, etc., Respondent.

St. Louis Court of Appeals, May 8, 1888. 31 69 / 53 56

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ORPHAN CHILD—COMPENSATION FOR MAINTENANCE.—One who has reared and maintained an orphan child cannot claim compensation for so doing if, at the time of his benefactions, he did not intend or expect to be paid for them. But he has the right to change his intention in this regard at any time, and if it appear that, at a certain point of time, he did so change it that thereafter he intended and expected to be compensated out of the child's estate, then he will be entitled to recover for reasonable and necessary expenditures in the child's behalf after such change of intention. And in a suit upon an account covering the whole period of care and maintenance, it is error for the court to deny him any right of recovery whatever, by sustaining a demurrer to the evidence.

APPEAL from the St. Louis Circuit Court, HON. JAMES A. SEDDON, Judge.

Reversed and remanded.

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G. M. Stewart, for the appellant: The only question which the court has to consider in this appeal is, whether the testimony adduced by the plaintiff tended to prove any fact which should have been submitted to the jury. We claim that the evidence offered and admitted very clearly tended to show: (1) That the appellant was under no legal or moral obligation to support the deceased; (2) that he did expect compensation for his support and education and expenditures which he incurred for him. The plaintiff did not stand in the relation of *loco parentis* to the deceased. A guardian of the person and curator of the estate of the deceased was appointed by this court about 1870 or 1871, who held that position and sustained that relation so long as decedent lived. This appointment passed the full control and custody of the deceased to the guardian. Rev. Stat., 1879, sec. 2578. The appellant was under no legal obligation to support him; had no legal control of him in any way; had no right to his wages, and was not liable for his support. There was no adoption of him by appellant. *Sharkey v. McDermott*, 16 Mo. App. 80. Mr. Lippman could at any time have refused to give the boy shelter, food, or clothing; could have refused to have nursed him during his last illness, or have given his body burial, and he would have violated no legal or moral obligation which he owed to the boy, nor would he have become liable to any other person who might have performed these offices for the deceased. The case must rest on these propositions, viz., (*a*) Were the charges which are made by the appellant for necessaries? (*b*) Did the appellant, Mr. Lippman, intend when so supplying the infant with these necessaries, to charge him or his estate for the same? That the charges made in this case were for necessaries will not, we apprehend, be disputed: his board, lodging, schooling, medical attendance, nursing, etc. That these were necessaries does not admit of argument. Did Mr. Lippman intend to charge for these necessaries

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or be compensated therefor? If there was any evidence tending to show this, then the case should have been submitted to the jury. *Folger v. Heidel*, 60 Mo. 384; *Trainer v. Turnbull*, 141 Mass. 527; s. c., 25 Am. Law, Reg. 695, with notes; *State ex rel. v. Sleven*, 6 S. W. Rep. 68.

SMITH & HARRISON, for the respondent: Mr. Lippman stood in the relation of *loco parentis* to the child. The plaintiff's evidence clearly showed that he voluntarily received the infant into his home as a member of his family without any intention of charging him for support and maintenance; and what was originally intended by him as a gratuity could not subsequently be turned into a charge. One cannot maintain a claim against the estate of an infant for care and support of such infant, where the testimony shows that such claimant voluntarily assumed the relation of *loco parentis* towards such infant without consulting his guardian and curator as to such care or support, or the necessaries to be supplied. *Academy v. Bobb*, 52 Mo. 357; *Folger v. Heidel*, 60 Mo. 284; *Whipple v. Dow*, 2 Mass. 418; *Allen v. College*, 41 Mo. 309. The relation of *loco parentis* having been established, the burden of proof was on the plaintiff to show a contract, express or implied, that he was to receive compensation. The law will not imply a contract in such circumstances, the relation of the parties repelling the presumption which would otherwise arise. Wharton on Contracts, sec. 719, and cases cited; *Cowell v. Roberts*, 79 Mo. 218, 221; *Guenther v. Birkicht*, 22 Mo. 439, and cases cited; *Bank v. Aull*, 80 Mo. 199, 202; *Morris v. Barnes*, 35 Mo. 412.

ROMBAUER, P. J., delivered the opinion of the court.

Mrs. Ballentine died in 1866, leaving four surviving children of tender age. Her husband Alexander, being unable to take care of them, three of the children were placed in a charitable institution, and the fourth, who

is the decedent, Wm. Ballentine Becker, then a child in arms, was taken into the family of Wm. Becker, and reared as a child of that family. Thereafter Alexander Ballentine, the father, was killed in a railroad accident, and Wm. H. Thompson was appointed guardian of the persons and curator of the estate of the four children. As such guardian he recovered four thousand dollars, in the year 1870, from the railroad company, being one thousand dollars for each of the children. This appears to have been their only estate. He acted as such guardian and curator until the three other children arrived at age, and then accounted to them as such. The residue of the share of Wm. Ballentine Becker, he paid to the defendant administrator, after the decedent's death in 1886.

Wm. Becker died in 1878, leaving a family of children. The plaintiff, a friend of the family, thereupon took Becker's children into his custody, including Wm. Ballentine Becker, and reared them all as members of his own family. There was at no time any express contract between the plaintiff and the curator Thompson, as to any compensation which the plaintiff was to receive for the rearing and maintenance of Wm. Ballentine Becker, nor did the plaintiff at any time prior to the year 1881 suggest to the curator the question of compensation.

In March, 1881, the plaintiff's financial condition having become materially changed, he approached the curator stating such fact, and requesting that he make some allowance for the support of the child, and the curator thereupon gave him one hundred and fifty dollars, out of money of the child in his hands. He paid to him like amounts in August, 1882, in June, 1883, in August, 1884, and in July, 1885, taking from him receipts in the following form :

"Received of Wm. H. Thompson, one hundred and fifty dollars, account necessary expenses for sustenance of his ward, Wm. T. Ballentine.

"LEWIS LIPPMAN."

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The amounts thus paid, aggregating seven hundred and fifty dollars, were allowed by the probate court to Thompson as proper credits in his final settlement with the decedent's administrator.

In January, 1887, plaintiff presented the following account for allowance against the decedent's estate, in the present action:

"To boarding, clothing, schooling, and care of deceased, from September, 1878, to September, A. D., 1885, seven years, at $150 per year....	$1,050 00
To cash paid expenses for deceased, in sending him to Denver, Colorado, on recommendation of physician, for the recovery of his health, and maintaining him while there, from September, 1885, to April, 1886...	$400 00
To care, support, and maintenance of deceased in St. Louis, from April, 1886, to August, 1886, during his last sickness, at $50 per month..	$200 00
To physician's bill paid for deceased, from September, 1878 to September, 1885........................	$ 100 00
Total amount due...............	$1,750 00

CR.

March 16th, 1881, by cash from curator, on account of maintenance.	$ 150 00
August 3rd, 1882.....................	150 00
June 5th, 1883.....................	150 00
August 26th, 1884.................	150 00
July 2nd, 1885.....................	150 00
Total...................... ..	$ 750 00
Balance due.....................	$1,000 00"

The account was rejected by the probate court, and

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upon trial in the circuit court on appeal, the facts above recited appearing in evidence with proof of the reasonableness of the charges in the account and the necessity of the expenditures, the court instructed the jury that plaintiff could not recover. The plaintiff thereupon took a nonsuit, and after an ineffectual motion to have the same set aside, brings the case here by appeal.

It will thus be seen that the only question presented for our consideration is, whether the plaintiff presented any evidence which entitled him to go to the jury, or whether upon the conceded facts he has no cause of action whatever, as a matter of law.

The rules of law which furnish an answer to this question are very simple. On the one hand, it is plain that the plaintiff was under no legal or moral obligation to support the child, and was, therefore, entitled to compensation for so doing, provided he did it under circumstances from which a promise to pay can be implied. *Trainer v. Trumbull*, 141 Mass. 527. On the other hand, it is equally plain that no promise can be implied contrary to the intention of the parties. *Folger v. Heidel*, 60 Mo. 284; *Cowell v. Roberts, Executor*, 79 Mo. 218, 221; *Aull Sav. Bank v. Aull's Adm'r*, 80 Mo. 199, 202. To that extent it is immaterial whether or no the plaintiff as to the child stood *in loco parentis*, as that relation, in the absence of legal adoption, subjects him to no legal duty of support. *Sharkey v. McDermott*, 16 Mo. App. 80.

Applying the law thus stated to the facts appearing in evidence, it seems clear that the plaintiff has offered no evidence tending to show that he took the child into his family intending to charge for its support. On the contrary, the evidence admits of no other construction, but that the intention to charge for such support was first entertained by him in 1881, when, owing to his altered financial condition, the burden became one which he considered too onerous to bear alone. But since he was under no obligation to support the child, he was at liberty to change that intention at

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any time. He could not change his intention so as to relate back to past expenditures (*Folger v. Heidel, supra; Hoolan v. Bailey*, 30 Mo. App. 585), but might change it so as to affect expenditures thereafter incurred. That he did do so, and that he advised the curator of that fact, sufficiently appears from the evidence to entitle him to go to the jury.

In conclusion we state that, while the plaintiff's evidence fails to support the first item of his account as to dates anterior to March 16, 1881, and shows by the credits in the account that he has no claim on that item remaining unpaid prior to March 16, 1886, and that, while the evidence debars him of all claim even on the last item of his account prior to March 16, 1881, there was evidence which entitled him to go to the jury on the residue of his account. The court, therefore, erred in withdrawing the case from the jury.

Judgment reversed and cause remanded. All concur.

FANNIE CRENSHAW, Guardian, etc., Appellant, v. J. F. G. BENTLEY, Administrator, etc., Respondent. 31 75 / 88 422

St. Louis Court of Appeals, May 8, 1888.

ADMINISTRATOR—COMMISSIONS.—When an administrator sells real estate of the deceased under regular orders of the probate court, receives the proceeds and disburses them in the payment of allowed demands against the estate, he is entitled to his statutory commissions on the money so received and paid out, whatever may have been the state of the title in the lands sold, or the condition of supposed trusts created by the deceased in his lifetime.

APPEAL from the Greene Circuit Court, HON. W. D. HUBBARD, Judge.

Affirmed.

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GOODE & CRAVENS, for the appellant: The administrator of an estate can take as assets only the property which the deceased owned at the time of his death. Rev. Stat., secs. 69, 70; 2 Williams on Executors [Am. Ed.] 1407; *Stockman v. Railroad*, 15 Mo. App. 503, 570; *Estate of Farron*, 1 Ashmead's Rep. 319; *Ashton's Estate*, Wharton, 228; *Griffith v. Beecher*, 10 Barb. 432. It is an immemorial doctrine that where land is charged by the deceased with the payment of debts, it becomes trust property and is cognizable only in chancery. Bispham's Prin. of Eq., p. 473, sec. 532. Our probate courts have no chancery jurisdiction. *Church v. McElhinney*, 61 Mo. 540. Want of jurisdiction may be taken advantage of at any time. *Smith v. Ashby*, 20 Mo. 350; *Henderson v. Henderson*, 55 Mo. 534; *Abernathy v. Moore*, 83 Mo. 65; *Bray v. Marshall*, 66 Mo. 122; *Eager v. Stover*, 59 Mo. 87. The administrator of an estate can take as assets only the property which the deceased owned at the time of his death. Rev. Stat., secs. 69, 70; 2 Williams on Executors [Am. Ed.] 1407, 1432; *Clay v.* Willis, 1 B. & C. 364; *Barker v. May*, 9 B. & C. 489; s. c., 4 Mann. & R. 336. "An administrator derives all his powers from the statute, and it only authorizes him to sell lands of which his intestate was seized at his death, and he cannot under the orders of the probate court sell lands which had been conveyed by the deceased to defraud creditors." *Bebee v. Souter*, 7 Cent. Law Jour. 466; *George v. Williamson*, 26 Mo. 190. The evidence shows that the trustees accepted the trust, but had they declined this would neither have given the administrator authority nor have impaired the trust. No trust ever fails for the want of a trustee. An equity court would have enforced the provisions of the deed by appointing a new trustee to carry them out. Tiedeman on Real Prop., secs. 508, 510, and cases cited. The trust reposed in Heer and Doling by Crenshaw was an obligation imposed on them to apply the property conveyed according to the terms of the deed, and was based on

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the grantor's personal confidence in them. It could not be executed by the administrator or any one else except those to whom the powers were given by Crenshaw, or their successors duly appointed by a chancery court. Willis on Trustees, 2; *Commissioners v. Walker*, 6 Howard, 143. The trustees were not entitled to commissions, much less the administrator. Hill on Trustees, 889. The section of the statute authorizing the commission has no application to money realized by selling land which had been conveyed by the deceased prior to his death. Rev. Stat., sec. 229.

McAFEE & MASSEY, for the respondent: An administrator is charged with all the property of the estate, no matter from what source derived. *Scudder v. Ames*, 89 Mo. 573; Schouler on Executors and Administrators, sec. 175. An administrator is entitled to, as a matter of law, "as compensation for his service and trouble, a commission of five per cent. on personal property and on money arising from real estate." Rev. Stat., sec. 229.

THOMPSON, J., delivered the opinion of the court.

This is a very peculiar proceeding. In October, 1884, L. A. D. Crenshaw and wife executed a deed of trust, by which Crenshaw (the wife releasing her dower) conveyed all his lands in Missouri and some lands in Alabama to Charles H. Heer and J. M. Doling, in trust, to be sold and the proceeds applied to the payment of his debts. They did not accept the trust, but the deed was duly recorded. In December of the same year Crenshaw made his will appointing Heer and Doling his executors. Soon thereafter he died, and in January, 1885, his will was admitted to probate in Greene county. Heer and Doling refused to qualify as his executors, and thereupon J. F. G. Bentley was appointed administrator with the will annexed. Bentley immediately qualified and entered upon the discharge of his duties as administrator, filing an inventory of the personal estate of the deceased and also of the real estate involved

in the controversy. The personal estate proving insufficient to pay the demands allowed against the estate, the administrator filed a petition for the sale of the real estate embraced in his inventory. After due publication of notice, an order was made to the administrator by the probate court to sell such real estate. In pursuance of this order, he sold several parcels of the real estate to six different purchasers for the aggregate sum of $27,778.70. As administrator, he made his deeds to the several purchasers. But, in order to obviate the possible defect of title growing out of the fact that the deceased had conveyed in his lifetime the property in trust to Heer and Doling, they also made their separate deed to the respective purchasers. These deeds, which are identical in their recitals, recite the making of the deed of trust by Crenshaw in his lifetime; the subsequent death of Crenshaw, leaving many of his debts unpaid; the due appointment of Bentley as his administrator; that Bentley had been, by the probate court of Greene county, "duly authorized to sell the real estate of said L. A. D. Crenshaw, deceased, for the purpose of paying the debts of said deceased;" that Bentley, as administrator, had sold the particular real estate described in each deed to the particular grantee; that said sale had been by the probate court of Greene county "duly approved," and that Bentley had made and delivered a deed to the particular purchaser, conveying to him all the right, title, and estate of Crenshaw in and to the real estate purchased (describing it). It then proceeded in its granting clause as follows: "Now, therefore, know all men by these presents, that we, Charles H. Heer, Sr., and James M. Doling, of the county of Greene in the state of Missouri, have this day, for and in consideration of the sum of one dollar to us in hand paid, and for the further consideration of the sum of ten thousand dollars, paid to the said J. F. G. Bentley, as administrator of the estate of the said L. A. D. Crenshaw, deceased, by (naming the particular grantee); and by virtue of the powers and authority in us vested by the said deed of L. A. D. Crenshaw,

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deceased, of, in and to the following described real estate, situated in Greene county, Missouri, which we, as trustees as aforesaid, have the right to convey, viz. (describing the tract sold to the particular purchaser). In witness whereof," etc.; each deed being signed and sealed by the two trustees and duly acknowledged.

Bentley, as administrator, made a report of the sales, which were by the probate court duly approved, and he was thereupon charged with the sum of $27,778.70, which sum, together with other moneys coming into his hands as administrator, he paid out upon orders of the probate court, excepting his statutory commission of five per cent., for which he claimed, and was allowed, credit upon his final settlement, which took place in consequence of his resignation of the office of administrator. To this final settlement the plaintiff, who is the widow of the deceased, in her own right, and as guardian and curator of several of the minor children of the deceased, filed exceptions, on the ground that the administrator was not entitled to any commission. The probate court disallowed these exceptions and affirmed the final settlement, from which judgment the plaintiff appealed to the circuit court. The circuit court in like manner disallowed her exceptions and confirmed the final settlement, from which judgment the plaintiff appeals to this court.

At the trial, all of the above recited facts were either admitted or proved without controversy. The only controverted fact seems to have been whether Heer and Doling intended to decline the execution of the trust committed to them by the deed of Crenshaw, as well as the office of executors of his will. We do not regard it as a matter of any importance which way this question of fact may have been decided. Nor do we think it necessary to speak of the declarations of law given and refused by the circuit court, because we are clear that the circuit court rendered the only judgment which, under the law, could have been rendered upon the foregoing state of facts.

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By section 229, of the Revised Statutes, executors and administrators are entitled, "as full compensation for their services and trouble, to a commission of five per cent. on personal property and on money arising from the sale of real estate." The sum of money already named, upon which the administrator in this case was allowed the commission of five per cent., was certainly a sum of money "arising from the sale of real estate" within the *letter* of this statute. The record conclusively shows that he rendered the "services" and was put to the "trouble" of making and reporting these sales and of disbursing the money which accrued therefrom. This trust which was devolved upon him, whether under a proper or an erroneous conception of the law, he has faithfully executed. He has performed the labor; he has incurred the responsibility; and why should he be deprived of the statutory compensation?

The reason set up for depriving him of it is one which we confess our inability to understand. It is, in substance, that this land never belonged to the estate of the deceased, because it had been conveyed by the deceased, prior to his death, to Heer and Doling in trust, to be sold and the proceeds distributed among his creditors; that Heer and Doling never renounced the trust; that if they had renounced the trust it would not affect the trust itself, because a court of equity will never allow a trust to fail for want of a trustee; that, as this land had been conveyed to them in trust, as trusts are peculiarly cognizable in equity, and as probate courts have no equity jurisdiction, the probate court of Greene county had no authority to order the administrator to sell this land; wherefore the sales made by him were void.

Suppose that all this is conceded, does it follow from this that the distributees of the estate have any standing, in relation to the funds which came into his hands from the sale of the lands, to object to his retention of the statutory commissions? If the sales were

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void, he thereby acquired the money of the several purchasers without any consideration, and in equity and conscience it should be handed back to them, if possible, and not turned over to the distributees of the Crenshaw estate, to whom it does not belong. If the sales were void, the land has never been sold, and consequently the probate court has not, nor has the circuit court (whose jurisdiction is derivative through the probate court) any jurisdiction in respect of the purchase money, to direct to whom the administrator shall pay it or who shall have it; and yet the exceptors are necessarily invoking in their own behalf the exercise of such a jurisdiction. Again, the lands either belonged to the estate of Crenshaw when they were sold by the administrator, or they did not. If they belonged to the estate of Crenshaw, the administrator is entitled, under the statute, to his commissions. If they did not belong to the estate of Crenshaw, then these exceptors, whose only rights in the premises are in virtue of their being distributees of Crenshaw's estate,—who have no standing in court except in so far as they claim *through* Crenshaw's estate,—have no concern with what is done with the purchase money. If it concerns the trustees, they are not objecting; and if they were, they might be estopped by their voluntary act in executing deeds in confirmation of the deeds of the administrator. If it concerns creditors of Crenshaw, as the beneficiaries in the trust created by Crenshaw by the deed to Heer and Doling, neither are they before the court objecting; and if they were, it might be that they could not object, in such a state of facts as that disclosed by this record, where it appears that they get through the administrator what they would have got through the trustees; but we need not speculate as to what their rights would be.

The whole argument which is put forward in support of these exceptions seems to be self-contradictory and illusory. All the judges concurring, the judgment is affirmed.

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STATE *ex rel.* H. CLAY SEXTON, Collector, etc., Appellant, v. EUGENE C. TITTMANN, Public Administrator, etc., Respondent.

St. Louis Court of Appeals, May 8, 1888.

1. REVENUE LAWS—APPELLATE JURISDICTION.—A suit by the tax collector against an administrator for taxes assessed against his intestate's estate, in which questions arise as to the nature of the remedy that may be sought, is a "case involving the construction of the revenue laws of this state," and is not within the appellate jurisdiction of this court. Hence, the cause must be transferred to the Supreme Court.

2. PER ROMBAUER, P. J., DISSENTING:—The constitutional phrase "involving the construction of the revenue laws of this state" is not equivalent in meaning with "questions affecting the revenue." It does not appear that the questions arising in this cause are not covered by the latter expression. There should be no transfer to the Supreme Court without a clearer warrant therefor than appears in such a case.

APPEAL from the St. Louis Circuit Court, HON. JAMES A. SEDDON, Judge.

Transferred to the Supreme Court.

E. C. SLEVIN, for the appellant.

A. M. GARDNER and SMITH & HARRISON, for the respondent.

THOMPSON, J., delivered the opinion of the court.

Taxes were assessed against the estate of Carrie C. Claiborne, deceased, in the hands of her administrator, for the years 1877, to 1884, inclusive. These taxes his successor, the public administrator, refused to pay, and this action is brought in the circuit court against the public administrator to recover the same, on the theory of enforcing a supposed equitable lien of the state for state, school, and city taxes. The court sustained a

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demurrer to the petition, and the plaintiff has appealed to this court.

The action proceeds upon the theory that, as but two methods have been prescribed by law for enforcing the payment of personal taxes, namely, by seizure and by procuring an allowance of them in the probate court in the case of taxes assessed against the estate of a person who has since died,' and that as neither of these remedies is applicable to the present case,—a remedy must exist in favor of the state by a suit in equity in the circuit court. There is no question here as to the legality of the assessment of the taxes sued for, or whether demand has been made at the proper times for their payment, or whether the public administrator has in his possession, belonging to the estate of Carrie C. Claiborne, funds with which to meet them. All these things are admitted by the demurrer. The sole question is, whether a suit in equity can be prosecuted for the recovery of personal taxes assessed against the estate of a deceased person in the hands of his administrator, no such action being given in terms by statute. It was said by the Supreme Court in a case much cited: "The levying of taxes is solely a matter of statutory creation, and no means can be resorted to, to coerce their payment, other than those pointed out in the statute. Should a tax be imposed, and no method provided by law for its recovery, a resort to legal proceedings would then be a matter of necessity. But this could only arise where the legislature had failed entirely to indicate any mode or manner of collection." *Carondelet v. Picot*, 38 Mo. 130. Whether or not, under a proper interpretation of the revenue laws, the state has no other remedy than an action in the circuit court, in a case of this kind; whether it has not the ordinary remedy by seizure, which it has in the case where the personal property, in respect of which the taxes have been assessed, has been *assigned* for the benefit of creditors (*State to use v. Rowse*, 49 Mo. 587); whether, if it has no other remedy, it is competent for the judicial

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courts to create one; and whether, if the judicial courts can create one, the remedy attempted in this case, on the theory that the state has what is called an *equitable lien* (which remedy excludes the rights of trial by jury and commits the whole case to the judge sitting as a chancellor), is a proper remedy;—all or some of these are questions which it is impossible to determine without construing the revenue laws of this state.

It is admitted by counsel for the plaintiff that if a remedy by seizure exists, this action does not lie, and his whole argument in support of this action is predicated on the premise that a remedy by seizure does not exist. Whether a remedy by seizure exists, therefore, meets us at the threshold of the case. This is a question involving the construction of the revenue laws, and this case cannot, therefore, be decided without construing the revenue laws. Our decision in the recent case of *State ex rel. v. Donaldson, Administrator*, 28 Mo. App. 190, does not govern this question, because we regarded that case as calling merely for the construction of the statute relating to the administration of estates. The question here presented is entirely novel. The title of the plaintiff to maintain the action, if it exists at all, exists chiefly in virtue of the revenue laws of the state. The case is, therefore, plainly within the policy of the constitutional provision, and is one which is eminently proper for the decision of the Supreme Court.

By the recent constitutional amendment changing the jurisdiction of this court, it has no jurisdiction in cases which, under the original constitutional provision creating it and establishing its jurisdiction (Const. Mo., art. 6, sec. 12), might have been appealed from this court to the Supreme Court; but such questions are now appealable directly to the Supreme Court (Laws of 1883, p. 216); among these cases are "cases involving the construction of the revenue laws of this state." Such appears to be the present case; and, although both parties submit the question in dispute to our jurisdiction, as the question is one which relates to our

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jurisdiction over the subject-matter of the controversy, which cannot be conferred by consent, we must transfer the cause to the Supreme Court. Laws of 1885, p. 121; *Arnold v. Hawkins*, 27 Mo. App. 476. It is so ordered. PEERS, J., concurs; ROMBAUER, P. J., dissents.

ROMBAUER, P. J., delivered a dissenting opinion.

I cannot agree with my associates on the point that this case involves the construction of the revenue laws of this state within the meaning of the constitutional clause giving to the Supreme Court exclusive appellate jurisdiction in such cases. I further hold that we are not warranted to transfer a case to the Supreme Court in opposition to the views of the circuit judge who granted the appeal to this court, and in opposition to the views and wishes of counsel who present it here, unless we have at least reasonable grounds to hold that the Supreme Court has exclusive appellate jurisdiction thereof.

The phrase in the constitution "involving the construction of the revenue laws of this state" is not equivalent in meaning with "questions affecting the revenue." That has been decided by the Supreme Court.

My associates fail to point any part of the revenue laws of the state which is sought to be construed in this proceeding. The opinion states "that the inquiry whether the remedy by seizure exists, meets us at the threshold of this proceeding." That statement, however, is hardly warranted in view of the fact that neither of the parties claim that such remedy does exist, and in view of the further fact that the court does not point out any section of the statute under which it can be claimed.

We have repeatedly decided that this court will not consider itself deprived of its appellate jurisdiction on the ground that the case involves the construction of the constitution of the United States or this state, unless the constitutional question raised is fairly debatable.

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State v. Kaub, 19 Mo. App. 149; *McCormick v. Railroad*, 20 Mo. App. 65; *Clarkson v. Guernsey Furniture Company*, 22 Mo. App. 109. The question whether the remedy by seizure exists is, in view of the decisions in *Brown v. Woody, Adm'r*, 64 Mo. 551, and *Bates County National Bank v. Owen*, 79 Mo. 431, hardly debatable. Nor is the question debatable whether the courts can supply a legislative omission by judicial construction in view of the decisions of this court to the contrary, in *Hewitt v. Truitt*, 23 Mo. App. 443, 447, and *Taafe v. Ryan*, 25 Mo. App. 563, 567.

While I am inclined to resolve any reasonable doubt on a question of conflicting jurisdiction in favor of the Supreme Court, I think we should not raise jurisdictional questions not raised by the parties themselves, and against their desire transfer a case to another court already overloaded with business, unless we have a clearer warrant for so doing than this controversy presents.

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FREDERICK ABEL *et al.*, Respondents, v. JOAB STRIMPLE *et al.*, Appellants.

St. Louis Court of Appeals, May 8, 1888.

1. **EVIDENCE, SECONDARY.—Where it is known that a paper once existed, and a diligent but unsuccessful search has been made for it in the place where it was most likely to be found, there is no error in permitting a witness who has had the paper in his possession and is familiar with its contents, to testify as to the subject-matter thereof.**

2. **WITNESS—REFRESHING MEMORY.—A witness who assisted in making out a writing, and who knows that its statements were true when made, may refresh his memory from such writing, although he has no independent recollection of all the facts therein appearing.**

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3. PRACTICE, APPELLATE—INADMISSIBLE EVIDENCE. — A judgment will not be reversed because of the admission of evidence inadmissible by law, when such incompetent evidence is confirmed by all the other testimony, and its exclusion could not have had a tendency to produce a different result.

APPEAL from the St. Louis Circuit Court, HON. DANIEL DILLON, Judge.

Affirmed.

KRUM & JONAS, and TAYLOR & POLLARD, for the appellants: The court erred in allowing Hellmers to testify touching the contents of the specifications. It is fundamental law, that the specifications are the best evidence of their own contents. Unless and until shown that they could not be had, all oral evidence of their contents was incompetent. No diligence to produce them was shown, nor evidence that they could not be found. *Benton v. Craig*, 2 Mo. 200; *Barton v. Murrain*, 27 Mo. 235; *Forcht v. Short*, 45 Mo. 377; 1 Greenl. on Evid., sec. 588. Where there is no sufficient evidence of sale and delivery of goods, and it is sought to supply this by memoranda, nothing short of the original books of entry of the tradesman will do. *Ludwig v. Lyon*, 8 Mo. App. 567; *Hoskins v. Atkins*, 77 Mo. 539. A mechanic's lien can be had only for the material which actually goes into the construction of the building. *Fitzgerald v. Thomas*, 61 Mo. 501; *Simmons v. Carrier*, 60 Mo. 582; *Schulenberg v. Prairie Home Inst.*, 65 Mo. 295; *Deardorff v. Everhartt*, 74 Mo. 37. And though the material was sold and delivered to the building, and for the building, nevertheless, no lien can be had against the building therefor, unless it actually enters into its construction. See cases cited above. The statute requires definite evidence as to the amount of material which goes into a building, in order to make the same the basis of a lien. Guessing and conjecturing is not sufficient evidence as to quantity. *Schulenberg v. Vrooman*, 7 Mo. App. 136; *Lewis v. Logan*, 7 Mo. App. 592. Where there is no

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evidence to support certain items in a mechanic's lien, it is the duty of the court, by instructions, to take such items from the jury. The court erred in refusing the instructions of appellants upon this point. The court erred in allowing exhibit B, filed with the petition, to be read in evidence, as showing the amount of material furnished by plaintiffs. The evidence utterly failed to show that it was a just and true account thereof.

RUDOLPH SCHULENBERG, for the respondents: The circuit court did not err in admitting in evidence the copy of the specifications. *Strain v. Murphy*, 49 Mo. 337; *Barton v. Murrain*, 27 Mo. 235; *Christy v. Cavanaugh*, 45 Mo. 375; *McConey v. Wallace*, 22 Mo. App. 377; 1 Greenl. on Evid., sec. 588. The court did not err in allowing witness Honig to refresh his memory by using the memorandum called exhibit B. 1 Greenl. on Evid., sec. 436; *Wernwag v. Railroad*, 20 Mo. App. 473; 1 Greenl. on Evid., sec. 38; *Taussig v. Shields*, 26 Mo. App. 325; *Smith v. Beattie*, 57 Mo. 281; 1 Greenl. on Evid., sec. 438; *Dugan v. Mahoney*, 11 Allen (Mass.) 572; *Queen v. Langton*, L. R., 2 Q. B. Div. 296. But the evidence given outside of the testimony of witness Honig was sufficient to warrant the verdict of the jury; the evidence as contained in the memorandum was merely cumulative, was not conflicting, and there was no evidence offered by the defendants, and, therefore, the judgment must be allowed to stand. *Ridgeway v. Kennedy*, 52 Mo. 24. "Where evidence, which is not strictly admissible, is yet confirmed by all the evidence in the case, and its exclusion could not have had a tendency to produce a different result, the judgment will not be reversed." *Tuggle v. Railroad*, 62 Mo. 425.

PEERS, J., delivered the opinion of the court.

This is a suit brought by subcontractors to enforce a mechanic's lien against certain property of defendant Harriet Beers.

It seems that J. Strimple & Son contracted with

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Harriet Beers and George Beers, her husband, to erect for them an addition to their hotel in the city of St. Louis, and the plaintiffs contracted with Strimple & Son to furnish at an agreed price the plumbing, sewering, and gas-fitting for the building. Rosenblatt and Obear, being the holders of incumbrances on the property, are made parties defendant.

The petition is in the usual form. The original contractors were brought in by publication; the other defendants were personally served, and appeared and filed a general denial for an answer. The trial in the lower court resulted in a judgment sustaining the lien, from which the defendants appeal.

Under the contract between plaintiffs and J. Strimple & Son, the plumbing, sewering, and gas-fitting had to be furnished at the agreed price of thirty-two hundred and twenty-five dollars, of which fifteen hundred dollars had been paid, leaving a balance of seventeen hundred and twenty-five dollars. The lien, being a subcontractor's lien, had to and does specify in detail the several items of material and work furnished under the contract, together with the respective marketable prices as to each item, the total amounting to $3,471.80, for which reason a voluntary credit of $246.80 was given in the lien.

The evidence of plaintiffs contained in the record is voluminous, while the defendants offered no evidence whatever.

The points relied upon for reversal, and to which the exceptions of defendants are directed, are the admission of certain evidence on the part of the plaintiffs and to the sufficiency of the evidence to warrant the verdict of the jury, and the refusal of the court to give certain instructions offered by the defendants.

Taking these questions as they are presented, it first becomes important to examine closely the evidence preserved in the bill of exceptions and objected to by defendants.

The first witness on behalf of the plaintiffs was

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Hellmers, the architect, who, being requested to produce the specifications, testified that they could not be found, that search had been made for them, that he had charge of them, and, on the return from the previous trial, he had placed them with other papers in his office, but, after searching every place in his office, they could not be found. The witness was then permitted to make the general statement that the specifications contained a general description of the plumbing and gas-fitting work, location, fixtures, and gas, but the description itself and the contents of the specifications were not testified to by the witness.

This testimony is objected to by the defendants, and the trial court is charged with error in permitting the same to go to the jury on the ground that it is not the best evidence. It is a well-settled principle that the writings, *i. e.*, specifications, are the best evidence of their own contents, and unless it was shown that they could not be had, all oral evidence of their contents is incompetent. "Where there is no ground for suspicion that a paper is intentionally withheld, and there is no apparent motive for deception, the courts are very liberal in regard to secondary evidence." *Barton v. Murrain*, 27 Mo. 237.

In this case it seems from the evidence that the paper once existed, and that a diligent but unsuccessful search had been made for it in the place where it was the most likely to be found. We think that sufficient diligence was shown to justify the court in permitting the witness to state that these specifications contained a general description of the plumbing, gas-fitting work, etc. *Strain v. Murphy*, 49 Mo. 337; *McConey v. Wallace*, 22 Mo. App. 377.

Defendants insist that the court erred in permitting the witness Honig to refresh his memory by using a memorandum called in the record exhibit "B." The exhibit was not offered and admitted in evidence, but the witness was allowed to use the same while testifying. It was a paper in the handwriting of Gerhard, one of

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the plaintiffs, compiled by him and witness Honig, they sitting together, from a number of "charging slips," containing all the material furnished, and which "charging slips" had been made by witnesses Honig and Kelley, and were destroyed after said paper exhibit "B" was compiled. Witness Honig had personal knowledge of the materials, he sending them out to the building, according to certain memoranda then made, and foreman Kelley afterwards reporting to him the exact amount of the fixtures and the measurement of the material as actually used in the construction of the building, and which reports of Kelley, after being compared with the memoranda, were then embodied by the witness Honig in the above-mentioned charging slips.

We can see no force in the objection to the witness using the memoranda as he did in this case. "It is a well-settled rule that a memorandum may be used to refresh the recollection of a witness, though he has no independent recollection of the facts stated in it, if he recollects having seen it before, and that he knew the contents to be true." 1 Greenl. on Evid. 437; *Wernwag v. Railroad*, 20 Mo. App. 473. But the memorandum must be produced in court in order that the other party may cross-examine, which in the case at bar was done.

"Where evidence which is not strictly admissible is yet confirmed by all the evidence in the case, and its exclusion could not have had a tendency to produce a different result, the judgment will not be reversed." *Ridgeway v. Kennedy*, 52 Mo. 24.

There was no evidence offered by the defendants in this case, and hence the rule, "where evidence is conflicting and illegal testimony is admitted the judgment should be reversed," does not apply, but the contrary rule that, "where there is no conflicting evidence, and no evidence offered on the part of the defendant, and the testimony was of such a nature that it does not seem that the party could have been prejudiced by it, the

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judgment will be allowed to stand," is the one applicable to this case. *Tuggle v. Railroad*, 62 Mo. 425.

Referring to the authorities cited by the defendants on this point we desire to say that upon an examination we do not think they apply to the facts and points in issue in the case before us. In *Ludwig v. Lyon*, 8 Mo. App. 567, the books were not offered, but an exhibit said to be a copy of the ledger account; there was also evidence that the salesman who was testifying did not make all the sales set out in the exhibit, nor know of the delivery, and there was no evidence that the books could not be produced; under these circumstances the exhibit was held inadmissible.

In the case at bar the witness Kelley saw all the materials used in the house. The "charging slips" were destroyed and exhibit "B," from which the witness refreshed his memory, was the only original entry about the materials.

Now as to the giving and refusing of instructions. When the plaintiffs closed their case the defendants, without offering any evidence, asked the court to give a number of instructions, which were properly refused for the reason that none of them were justified by the facts as disclosed in the evidence.

The case seems to have been fairly tried; the evidence justified the finding, and the judgment will, with the concurrence of the other judges, be affirmed.

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WILLIAM C. FARRAR, Trustee of ELIZA MCKEE, Respondent, v. LOUIS J. SNYDER *et al.*, Appellants.

St. Louis Court of Appeals, May 8, 1888.

1. EVIDENCE, IRRELEVANT.—In an action of replevin where the plaintiff claims under a bill of sale from an insolvent debtor firm, evidence offered by the defendants, who were attaching creditors, to show that they had no knowledge of a chattel mortgage executed by the debtors to the plaintiff's beneficiary prior to the bill of sale is irrelevant and properly excluded.

2. EVIDENCE—DECLARATIONS OF VENDORS AFTER SALE.—It is not admissible to prove the declarations or admissions of vendors, made after the sale and transfer of possession, to impeach the title of their vendee.

3. EVIDENCE—CONSPIRACY.—Where there is no evidence of conspiracy between the plaintiff or his beneficiary and his vendors against the rights of the defendants as creditors of the vendors, it is not competent for the defendants to introduce evidence showing what disposition was made by the vendors of certain moneys in their possession.

APPEAL from the St. Louis Circuit Court, HON. DANIEL DILLON, Judge.

Affirmed.

DAVIS & DAVIS, for the appellants: The testimony of Mr. Hazzard as to his knowledge of existence of chattel mortgage should have been admitted. The testimony of Mr. Hazzard and Davis as to conversations with and declarations of vendors, while they were in possession of the property, was competent. *Burgert v. Borchert*, 50 Mo. 80; Greenl. on Evid. [14 Ed.] sec. 113; *Boyd v. Jones*, 60 Mo. 454; *Cordes v. Strasberger*, 8 Mo. App. 61. The testimony of Mr. Sage as to disposition of the four hundred dollars made by him should have been admitted. *State to use v. Engelke*, 20 Mo. App. 21.

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H. A. CLOVER and EDMOND A. B. GARESCHÉ, for the respondent.

PEERS, J., delivered the opinion of the court.

This is an action of replevin originating in the circuit court of the city of St. Louis.

It seems that Bailey, Sage & Company, in the year 1886, were engaged in the stationery and printing business in St. Louis, and, being unable to command sufficient capital to run their business in competition with other concerns in the city, got considerably behind in their accounts. They attempted to raise money, and in October, 1886, applied to Mrs. Eliza McKee, a lady of large means, for a loan of three thousand dollars, which they procured by giving their four notes, due in one, two, three, and four years, bearing interest at the rate of six per cent. per annum. At the time of the execution of these notes, they also executed and delivered to her a chattel mortgage on their fixtures then in the store occupied by them. This mortgage was never recorded. The money thus obtained was used by Bailey, Sage & Company in purchasing machinery for their business, paying their several creditors, among whom were the present appellants, and who received five or six hundred dollars on a debt due to them.

The business of Bailey, Sage & Company ran along smoothly until May, 1887, when the building occupied by them fell in, destroying the greater part of the stock and fixtures of the firm, and damaging them to such an extent that they were unable to further carry on their business. They took from the ruins such of the stock as was not totally destroyed, and after making an invoice called a meeting of their creditors, explained to them their condition, and asked an extension of one, two, three, and four years, saying at the time that they would be unable to secure their paper should the extension be granted. All of the creditors refused to grant the extension asked except Mrs. McKee, who was represented at

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the meeting of the creditors by Mr. Farrar, and who was willing, if the arrangement could be made with the other creditors, to take her chances with the rest. The meeting adjourned without any settlement being effected, whereupon, Bailey, Sage & Company, feeling called upon to protect Mrs. McKee, executed a bill of sale to Farrar, trustee for Mrs. McKee, conveying to her all of their assets, the total invoice value of which was twenty-six hundred dollars, and the actual market value of which was about thirteen hundred dollars, together with certain book accounts due and owing to them. The stock and fixtures were subsequently sold out by Farrar and he realized from them and the book accounts, from seventeen to eighteen hundred dollars, or about sixty per cent. of the McKee debt.

Farrar took possession under his bill of sale, put a man in charge of the business, and changed the letter-heads, orders, etc., so as to read "Wm. C. Farrar, trustee, successor to Bailey, Sage & Company." The business was advertised for sale and on the same day the bill of sale was handed to a Mr. Anderson, who was told to have it recorded. The giving of the bill of sale coming to the attention of William T. Hazzard, the then representative of the appellants, through the Bradstreet agency sheet, appellants sued out an attachment which was levied on the goods mentioned in the bill of sale, upon which the respondent replevied the goods, and after a trial in the circuit court, resulting in a verdict and judgment for the plaintiff, the case comes here by appeal.

The only point made on which we are asked to reverse the case is as to the admissibility of the following evidence:

"William T. Hazzard testified:

Q. "I will ask you who extended Bailey, Sage & Company this credit of seven hundred and seventeen dollars, under which this suit was brought?

A. "I did.

Q. "Did you know at the time you extended this

credit of seven hundred and seventeen dollars, that there was a chattel mortgage on the assets of Bailey, Sage & Company, given to Elizabeth McKee for the sum of three thousand dollars?

"Plaintiff's counsel objects to question and objection sustained.

Q. "Did you go down to the office of Bailey, Sage & Company, after the thirteenth day of July?

A. "I went down there on the day that that bill of sale was noted of record on the agency sheet; I don't remember the day.

Q. "What did you see down there?

A. "I saw Mr. Bailey and Mr. Sage and Mr. Anderson in charge.

Q. "What was Mr. Bailey doing

A. "Mr. Bailey was apparently busy about his usual work.

Q. "Pretty much as he had been doing before?

A. "About the same character of work

Q. "Mr. Sage?

A. "Mr. Sage was apparently doing the same thing.

Q. "And Mr. Anderson?

A. "And Mr. Anderson.

Q. "What change was there in the signs down there?

A. "I saw none.

Q. "The same sign had been there since they had been in business?

A. "The same sign.

Q. "Did you have any conversation with either of them, either Bailey or Sage, in relation to the bill of sale?

"Objected to and objection sustained.

"Henry B. Davis testified: On the thirteenth of July, about half-past eight o'clock in the morning, I went down to the office of Bailey, Sage & Company, under the Republican building, and found the office in the condition that it had been when I had been there

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before the fifth of July, with the sign in front and Henry V. Bailey in the office. I asked Mr. Bailey what was the meaning of the bill of sale, and Mr. Bailey said—

"Testimony objected to and objection sustained.

"Mr. Sage's testimony:

Q. "Now you had eight hundred dollars in cash when you called your creditors' meeting?

A. "Well, there was some amount there, either seven hundred or eight hundred dollars.

Q. "Isn't it a fact, before you called your meeting of creditors, you had checked out your eight hundred dollars, and divided it between you and Mr. Bailey?

A. "I believe it was prior to that.

Q. "What have you done with your half of it?

"Plaintiff's counsel objects and objection sustained."

I.

Appellants insist that the testimony of Mr. Hazzard as to his knowledge of the existence of the chattel mortgage should have been admitted, but upon what theory it does not appear. As an abstract proposition, we are unable to discover how any light could be thrown upon the issues of the case by permitting Mr. Hazzard to testify that he never knew of the chattel mortgage, given by Bailey, Sage & Company, to Mrs. McKee. Hazzard's knowledge of the fact that there was such a mortgage could not affect the issues one way or the other, for the reason that the plaintiff did not claim under that paper but under a subsequent bill of sale. We think the trial court properly sustained the objections to the evidence on the ground that it was immaterial.

II.

Was the testimony of Mr. Hazzard and Mr. Davis as to conversations with and declarations of vendors while they were in possession of the property competent? This point must be considered in connection with

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all the evidence offered in the case as the same is preserved in the record before us. As a proposition of law, there can be no question but that the declarations of vendors of personal property while they were in possession, explaining their title or the character of their possession, is receivable in evidence as against them, and may, under certain circumstances, be admissible even against those claiming under them. *Boyd v. Jones*, 60 Mo. 454. However, as a condition precedent to the introduction of any evidence as to the declarations of the vendors, after sale, it was incumbent upon defendant to first establish that the vendors were in possession. The declarations and admissions that were rejected in evidence in this case were not made until some time after the vendee had taken possession of the goods under the bill of sale. The vendee took possession in this case on the fifth day of July, while the conversation which the court excluded took place on the thirteenth day of July. The vendors then had no control of the goods, and they did not have such an interest in the goods as entitled them to make any declarations or admissions that could affect the rights of the vendee. Whatever they may have said was mere hearsay and not competent evidence against the plaintiff who held and was in possession under the contract of sale. The evidence discloses that the whole business had been transacted in the name of Wm. C. Farrar, trustee, successor to Bailey, Sage & Company, and Anderson was in possession as the representative of Farrar. All the business done by Anderson was in the name of Farrar, trustee, successor to Bailey, Sage & Company, and as the evidence shows, this was shown by the stamps on the orders and letter-heads used in conducting the business, so that persons who were accustomed to dealing with the old firm were apprised of the fact that there had been an actual change in the possession of the property. *Steward to use v. Thomas, Adm'r*, 35 Mo. 202; *Weinrich & Co. v. Porter*, 47 Mo. 293.

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The old sign which read "Printing and Stationery" was allowed to remain, but there was no evidence in any part of the record that the name of either Bailey or Sage appeared any where in or about the business after possession was taken by Farrar. The change must have been patent to Mr. Hazzard, for in his testimony he says he went to the office of Bailey, Sage & Company, after the thirteenth of July, and he found there Mr. Bailey, Mr. Sage, and Mr. Anderson in charge; Bailey and Sage were retained because, as Mr. Farrar in his testimony says, *he* knew nothing about the printing and stationery business, and it was, therefore, necessary for him to keep them until such time as he could wind it up.

There is no reason why Farrar should not have retained in his service in and about the property either Bailey or Sage or both in the same manner as any other employes. *State to use v. Donelly*, 9 Mo. App. 519; *Claflin v. Rosenberg*, 42 Mo. 439.

In view, therefore, of the fact that Mr. Farrar had previously testified that he had taken possession on the fifth, and had placed Mr. Anderson in charge, and in view of the further fact that an open and notorious change had been made in the method of transacting the business, and that the change was so patent as to be observed by Mr. Hazzard at once upon his calling at the store, any declarations which either Mr. Bailey or Mr. Sage might have made in the absence of the vendee or her trustee were clearly incompetent, and the objection to them was, therefore, properly sustained. *Albert v. Besel*, 88 Mo. 154.

III.

We are of opinion that the trial court committed no error in refusing to permit Mr. Sage to testify as to the disposition he made of the four hundred dollars checked out of bank prior to the meeting of the creditors of Bailey, Sage & Company. Under that part of the

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answer where the defendants charged "that in pursuance of said fraudulent, wicked, and unlawful conspiracy, and with the knowledge and consent of all of said conspirators (*i. e.*, Bailey, Sage, and Mrs. McKee), the said eight hundred dollars in cash was divided by the said Henry V. Bailey and Timothy K. Sage, and that four hundred dollars of said money so obtained by said Sage was hidden by him upon the person of his wife, where the same could not and cannot be reached by due process of law, and that the said four hundred dollars so obtained by said Henry V. Bailey was concealed upon the person of one Miss Anderson, the aunt by marriage of the said Henry V. Bailey, where the same cannot be reached by law", the evidence sought to be elicited was relevant; but up to the time this testimony was offered, the record discloses no evidence going to show a conspiracy between Bailey and Sage, or either of them, and Mrs. McKee, and hence the same was properly excluded. The trial court offered to allow it to go in if the evidence was offered for the purpose of establishing that the money had been paid to Mrs. McKee, and when counsel for appellant refused to state that it was for that purpose he asked the question, the court very properly, we think, sustained the objection.

As to the question of conspiracy, we need only say that we find nothing in the testimony justifying the charge.

There being no error in the record, the judgment is affirmed. All concur.

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CHARLES B. STARK, Respondent, v. BRITTON A. HILL, Appellant.

St. Louis Court of Appeals, May 8, 1888.

1. **EVIDENCE—PROFESSIONAL SKILL.—In a suit by an attorney for professional services rendered in the taking of depositions, an unofficial transcript of the depositions taken, with the questions put to the witnesses and their answers, made by a witness who was present, is proper, to be used in connection with his testimony as evidence on the questions of reasonable skill and diligence exercised by the attorney and the value of his services.**

2. **COSTS—BILL OF EXCEPTIONS—SUPERFLUOUS MATTER.—Where in an appeal the only question raised relates to the admissibility of certain evidence, and the appellant's bill of exceptions contains a mass of irrelevant matter pertaining to other features of the case, against which the respondent has made timely objections on the score of unnecessary expense, then, although the judgment be reversed and the cause remanded, it is proper for this court, on motion, to retax the costs so as to compel the appellant to pay a reasonable part thereof, in due proportion to the extent of the irrelevant matter so encumbering the record.**

APPEAL from the St. Louis Circuit Court, HON. JAMES A. SEDDON, Judge.

Reversed and remanded.

MARTIN, LAUGHLIN & KERN, for the appellant: The court erred in excluding this duplicate copy of the depositions taken by commissioner Denison. When shown to contain the questions propounded by plaintiff to the witnesses, and the answers given, the matter was competent as showing the work actually done by the plaintiff, and it was proper for the court trying the case to know what this work was, and also material for the experts to base their opinions upon as to the value of the work done. It was competent for the defendant to show just what the work sued for was, and to that end competent for the witness Cohick to use the memoranda

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made at the time to tell the court what that work in fact was. We understand the rule to be that, in the absence of an express stipulation for his fee, an attorney is entitled to recover the reasonable value of his services. *Wright v. Baldwin*, 51 Mo. 269; *Webb v. Browning*, 14 Mo. 354; *Rose v. Spies*, 44 Mo. 20. But we contend that the reasonable value of such services do not depend entirely, but indeed to a very limited extent, on the time occupied in such services. The element of professional knowledge, the element of professional skill, and the element of benefit to the client are of vital, if not of controlling, importance. Wicks on Attorneys at Law, 577. *Lombard v. Bayard*, 1 Will, Jr., 207, referred to in *note*, Wicks on Attorneys, page 578, in this language: "In all cases, professional compensation is gauged not so much by the amount of labor as by the amount in controversy, the ability of the party, and the result of the effort." *Rose v. Spies*, 44 Mo. 20.

R. S. MACDONALD and JOHN A. GILLIAM, for the respondent: Appellant's questions to witnesses Simmons and Cohick, founded upon the Cohick memoranda, called for their opinions as to the materiality, relevancy, and competency of the questions asked by Stark. These were questions of law, and a witness is not permitted to give his opinion on a question of domestic law. Lawson on Expert Evidence, 60; *Gaylor's Appeal*, 43 Conn. 82; *Massure v. Noble*, 11 Ill. 531; *Roberts v. Cooper*, 20 How. 467; 2 Miller, 529. Supposing the Cohick memoranda were competent to prove that Mr. Stark asked immaterial and irrelevant questions, such evidence would be merely cumulative to Cohick's, Wingate's, and Simon's evidence, and the rule is not to reverse for the admission or exclusion of merely cumulative evidence. *Prickett v. Anchor Line*, 13 Mo. App. 436; *Clark v. Finn*, 12 Mo. App. 583; *Gas Co. v. St. Louis*, 12 Mo. App. 573; *Miller v. Miller*, 13 Mo. App. 591; *State v. McGuire*, 16 Mo. App. 558.

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THOMPSON, J., delivered the opinion of the court.

The plaintiff, who is an attorney-at-law, has brought this action to recover the reasonable value of certain professional services rendered by him at the instance and request of the defendant, between the first of April and the first of August, 1886. The answer was a general denial. The cause was tried before the court without a jury. There was a finding and judgment in favor of the plaintiff in the sum of eleven hundred and seventy-five dollars. No instructions were asked or given. The only question which arises upon this appeal is the propriety of the ruling of the trial court in excluding a certain writing as evidence and in ruling that the witness who wrote it could not use it as a memorandum for the purpose of refreshing his recollection.

It appeared from the evidence that the defendant employed the plaintiff to take depositions in St. Louis to be used in defence of an action brought by Mrs. Edmundstone against E. C. James in the Supreme Court of St. Lawrence county, New York, which action the defendant was interested in defending; and that the plaintiff had consumed about eighty-two days in the taking of these depositions. The plaintiff's evidence tended to show that the defendant had agreed to give him a reasonable professional remuneration for the services so to be performed, while the defendant's evidence was to the effect that he agreed to give the plaintiff ten dollars per day. The defendant undertook to show that the plaintiff had prolonged the taking of the depositions for an unreasonable length of time and had conducted the examination and cross-examination of the witnesses in an unskilful manner; and for this purpose he offered in evidence a transcript of the examination of the witnesses taken down by another member of the bar employed by him for that purpose. This gentleman who had taken this transcript testified that it contained all the questions which were put to the witnesses and all the answers given by them, but it appeared from his testimony that

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it was not a literal copy of the depositions as they were taken down and forwarded by the commissioner, and that it omitted some unimportant things which those depositions contained, such as statements of meetings and adjournments on days on which no testimony had been taken. On the objection of the plaintiff, the court excluded this transcript of the examination of the witnesses and afterwards refused to allow the attorney who had taken it to testify from it, as a memorandum to refresh his recollection, as to the questions which were put to one of the witnesses and the answers given by her, on the ground that they were irrelevant and immaterial.

We are of opinion that in so ruling the trial court erred. Although the depositions, as taken and certified and forwarded by the commissioner, were the only competent evidence of the testimony of the various witnesses for the purposes of the suit in which they were taken,—namely, the suit of Edmundstone *vs.* James in the court in New York,—yet, for the purposes of this suit, any transcript of the testimony of such witnesses, verified by the oath of a competent witness, or even oral testimony as to the manner in which they had been examined and cross-examined, was competent evidence. Certainly it was material to the present issue to show in what manner the plaintiff had discharged the duty which he had been employed by the defendant to perform. It was not intended to read this mass of testimony as evidence. Counsel for the defendant in offering it disclaimed that purpose; but it was proposed that experts should examine it and from such examination should say whether the plaintiff had protracted the examination of the witnesses unreasonably, and whether he had discharged the professional duty for which the defendant had employed him in a reasonably skilful and proper manner. Certainly this inquiry had a direct tendency to show what was the reasonable value of his services; since services performed skilfully and without

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an unnecessary waste of time and consequent accumulation of costs would be worth more than services performed unskilfully and with an unnecessary waste of time. If, then, this evidence was material, a transcript of the testimony taken down upon the spot and shown to be correct by the oath of the person who took it, would seem to be the very best evidence of the manner in which the examinations had been conducted. The case, we think, has been aptly likened by counsel for the defendant in their printed argument to a case where a conveyancer brings an action for the reasonable value of his services in drawing a will. Would not the will itself, or a copy of it, be relevant upon the question whether he had performed his services with reasonable care and professional skill?

We, of course, express no opinion upon the questions of fact involved in this case, further than to say that the circumstance that the defendant in this action is himself an eminent practitioner and that he was frequently present at the examination of these witnesses, is not of itself controlling, so far as the question of the admissibility of this instrument of evidence is concerned; since it might well be that, without carefully going over the depositions at the time when they were taken, he confided in the care, skill, and fidelity of the plaintiff in respect of the manner in which the examinations should be conducted and the extent to which they should be prolonged.

All the judges concurring, the judgment is reversed and the cause remanded.

THOMPSON, J., delivered the opinion of the court on motion to retax costs.

This is a motion by the respondent to retax the costs, on the ground that the bill of exceptions contains a mass of matter which was unnecessary for presenting the single point of law which was presented by the appellant in this court, and upon which the decision of this court was rendered. It appears that the judgment

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of the circuit court was rendered on the twenty-ninth of November, 1887; that the motion for new trial was overruled on the tenth of January, 1888; that the bill of exceptions was signed and filed on the thirty-first of January, 1888, and that the last day of the term was the fourth of February following. The transcript contains one hundred and ninety pages of matter. In it there is embodied a full stenographer's transcript of the proceedings at the trial. In short, the case is brought here as it would properly be brought here if it were a case in equity, where we rehear the facts; or a case at law where the error assigned is, that there is no substantial evidence in support of the verdict, or that the instructions are framed upon hypotheses of fact not presented by the evidence. Instead of this, in the present case, the trial was before the court sitting as a jury, and no instructions were asked or given; and the motion for new trial contained but two objections: (1) The excluding of material and competent evidence offered by the defendant; (2) that the damages were excessive. The second objection, though properly urged in the trial court, that court having a discretionary power to set aside its own findings as being against the weight of the evidence, could not have been urged here, because the award of damages was within the limits of the evidence, and we have not the same power to revise the findings of the trial courts on questions of fact, in law cases, which they themselves have on motions for new trial. The question which was presented, and upon which the appeal was decided, was, therefore, the only question which could have been plausibly presented in this court; and the appellant, or his counsel, should have foreseen this when the bill of exceptions was prepared. But it appears that this fact was brought to their attention by objections, seasonably filed by the respondent, to the signing of the bill of exceptions as prepared, on the ground of unnecessary cost and expense. It appears that these objections were served on appellant's counsel, who did not confess the same, but who offered, in

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lieu thereof, to enter into a stipulation that the so-called Cohick depositions (the matter which had been excluded as evidence by the trial court) might be brought to this court in their original form, without being incorporated into the bill of exceptions and copied into the transcript. This stipulation was agreed to and signed by the respondent. It contained the clause that "plaintiff reserves all his right upon taxation of costs," and it concluded by stipulating that "this stipulation shall be introduced in this bill of exceptions at the end of the testimony as written." About the same time, just at what date does not appear, for they were not filed, but after they had been served on the appellant's attorneys, the respondent presented to the circuit court his objections to the proposed bill of exceptions, and they were overruled. A copy of these objections is before us. The first paragraph was as follows:

"1. Because the whole testimony given by the witness on the trial (except the deposition of E. C. James) is incorporated into the proposed bill of exceptions, whereas, in order to properly present the case for review to the St. Louis Court of Appeals, it is only necessary, under rule eleven of said court, to show the general nature of the case and to incorporate into the bill of exceptions such parts (questions and answers) of the testimony of the witnesses Hermann, Cohick, Simmons, and Lodge as are necessary to make the rulings of the court intelligible on the evidence excluded by the court."

In the fourth paragraph the plaintiff asserted that the bill of exceptions could be made up in such a way as to preserve for review all the defendant's exceptions to the rulings of the court and completely to insure to him the full benefit of his appeal, for no greater sum than forty dollars at the extreme limit. The fifth objection was as follows:

"5. Because, for the following reasons, the plaintiff cannot make his objections to the proposed bill of exceptions under rule thirty-one of this court, in view

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of the method adopted by the defendant; for to do so he would be compelled to undergo the expense and labor of preparing a new bill of exceptions for the use of the defendant, which is not contemplated by said rule."

Rule thirty-one of the circuit court therein referred to is as follows:

"Within ten calendar days after any ruling is made at special term to which a party desires to except, the party excepting shall prepare a bill of exceptions, and shall cause the same, or a copy thereof, to be served, as prescribed by law for the service of notices, on the adverse party, who shall, within three calendar days thereafter, make objections (if there be any) thereto in writing, on a separate piece of paper, pointing out particularly the alterations and additions proposed thereto, and cause the same, or a copy thereof, to be served in like manner on the excepting party. If the excepting party does not agree to such alterations, then the proposed bill and alterations shall be submitted to, and settled by the court. If no objection be thus made to such bill within said three days, all objections shall be considered waived, and the same shall then, at the same term, be presented to the court for signature, if found correct, or for such amendments as may conform the same to the facts. No execution shall issue, without special leave of court, within fifteen calendar days after a motion for new trial or in arrest is overruled."

Rule eleven of this court is as follows:

"When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated."

A bill of exceptions might have been made up, presenting the question on which this appeal was prosecuted, within such limits that the transcript would not have exceeded twenty-five pages at most. As no question could be presented for decision in this court upon the mass of testimony which was taken at the trial, it

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was wholly unnecessary to bring a stenographic report of it here. By bringing it here, an unnecessary burden was imposed upon this court; since we could not tell what parts of it were material to our decision without reading the whole. The impropriety of making up bills of exceptions in this way, where mere questions of law are raised for decision, has been often pointed out. *Barge Resort v. Brooke*, 10 Mo. 531; *Wallace v. Boston*, 10 Mo. 663; *Harper v. Minor*, 27 Cal. 111; *Kimball v. Semple*, 31 Cal. 657; *Lincoln v. Claflin*, 7 Wall. 132; *Armstrong v. Toler*, 11 Wheat. 258, 276. The cost of such unnecessary matter does not form, in any proper sense, a part of the costs of the appeal; but appellate courts have the power, in order to protect themselves from unnecessary burdens, and in order to protect respondents from the payment of needless expense where judgments are reversed, to order that the costs of such unnecessary matter be taxed against the appellant, notwithstanding he is the successful party on the appeal and is entitled by force of statute, or otherwise, to recover full costs against the respondent. *Railroad v. Stewart*. 95 U. S. 279; *Chambers v. Fisk*, 22 Tex. 504; *Smith v. Smith*, 30 Ala. 642; *Van Dusen v. Pomeroy*, 24 Ill. 289; *Railroad v. Jones*, 20 Ill. 221. In *Wiggins Ferry Co. v. Railroad*, 5 Mo. App. 347, this court applied the same rule, and, although the judgment was reversed, taxed against the appellant the costs of a large amount of immaterial matter which had been brought up in the transcript.

In exercising such a power, we cannot make any nice discriminations, such as will cramp or hamper counsel for appellants in bringing up such a bill of exceptions as will fully and fairly present the errors which they assign. We cannot go through a long bill of exceptions like this and say what particular page, or one-half or one-fifth of a page might properly have been retained, in order to present the question which was presented. But we can say, from our experience in dealing with these subjects, that a bill of exceptions twenty pages in

length, making with the pleadings and other entries, a transcript of, say, twenty-five pages in length, would have been amply sufficient to present the question upon which this appeal was prosecuted. And the respondent having seasonably and fully objected on the ground of costs to the bill of exceptions, as drawn, and not having, so far as we can see, waived his objections by signing the stipulation touching the Cohick depositions, or otherwise,—we think that we shall, without attempting to discriminate too nicely, exercise our power justly, if we sustain this motion to the extent of ordering the clerk to tax twenty-five dollars of the costs of this appeal against the respondent and to tax the remainder against the appellant. The appellant will also pay the costs of this motion.

It is so ordered. PEERS, J., concurs; ROMBAUER, P. J., is absent.

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SARAH J. SPARKS, Respondent, v. KANSAS CITY, SPRINGFIELD & MEMPHIS RAILROAD COMPANY, Appellant.

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St. Louis Court of Appeals, May 8, 1888.

1. PRACTICE—INSUFFICIENT AVERMENTS.—There can be no recovery under Revised Statutes, section 2122, of damages for the death of the plaintiff's minor son, when it is neither averred nor proved that the deceased left no widow or surviving children. The objection is not waived by pleading over, and may be presented by demurrer to the evidence, or by a motion in arrest.

2. NEGLIGENCE — DEFECTIVE MACHINERY. — Where there was no evidence tending to show that the machinery by which the plaintiff's son lost his life was of defective construction, or that it was improperly adjusted, or insufficiently oiled, or that the defendant's officers or agents knew of any latent defects therein, and where it affirmatively appeared that the deceased voluntarily assumed a dangerous and unnecessary position in handling the machinery, and that if he had exercised the most ordinary care he would have handled it in a different manner and would not have been hurt, it results, as a matter of law, that the plaintiff showed no right of recovery, and that this court should reverse the judgment in her favor, without remanding the cause.

APPEAL from the Oregon Circuit Court, HON. J. F. HALE, Judge.

Reversed.

WALLACE PRATT, OLDEN & GREEN, and C. B. MCAFEE, for the appellant: Under the evidence in this case the court below should have taken the case from the jury by giving defendant's first instruction asked at the close of plaintiff's case and renewed again at close of evidence. *Powell v. Railroad*, 76 Mo. 80; *Yarnall v. Railroad*, 75 Mo. 575; *Bell v. Railroad*, 72 Mo. 57; *Railroad v. Ritchey*, 102 Pa. St. 425; *Railroad v. Senpyer*, 92 Pa. St. 276; *Railroad v. Holmes*, 5 Col. 197. When the plaintiff in making out his case clearly

establishes that the injury he complains of was as much the result of his own negligence as that of the party of whose negligence he complains, he cannot recover. *Milleum v. Railroad*, 86 Mo. 189; *Buesching v. Gas Co.*, 73 Mo. 229. There is no conflict in the evidence that this switch could be handled safely by the exercise of ordinary care. There is no evidence that this switch was dangerous or unfit for use, and defendant ought to have judgment here on this point. The court improperly admitted testimony tending to show that defendant may have made changes in this switch after the accident. There was no evidence that the switch was defective, unsafe, or dangerous, and permitting such evidence to go to the jury was in effect telling them that, "this act of defendant is an admission of that which plaintiff has failed to otherwise prove, viz., that something was wrong with the switch or defendant would not have made changes after the accident." Besides, the evidence was inadmissible for any purpose. *Cramer v. City*, 45 Iowa, 627; *Switland v. Tel. Co.*, 27 Iowa, 434; *Hudson v. Railroad*, 8 A. & E. R. R. Cases, 464. The petition does not state facts sufficient to constitute a cause of action. The language of the statute is: "That if deceased be a minor and unmarried, then the father and mother, or the survivor may sue." Rev. Stat., secs. 2121, 2123. The right of action being created by statute, one who sues must bring himself within the statutory terms. *McNamara v. Slavins*, 76 Mo. 329; *Baker v. Railroad*, 91 Mo. 86. The petition fails to state that deceased was a minor and unmarried, nor is there anything averred from which it could be inferred that he was unmarried, and herein it fails to state a cause of action. *Dulany v. Railroad*, 21 Mo. App. 597.

MAXEY, VANWORMER & WINNINGHAM, for the respondent.

ROMBAUER, P. J., delivered the opinion of the court.

This is a statutory action under the provisions of

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section 2122 of the Revised Statutes. The action is brought by the sole surviving parent to recover damages for injuries resulting in death, caused to her minor son, an employe of the defendant, by defect in the machinery for setting a switch. The answer consists of a general denial and the plea of contributory negligence.

Plantiff's right to bring the action is stated in the petition as follows: "Plaintiff states that she was the mother of Harry Barton, and that his father is dead, and was dead on the eighteenth day of November, 1885; that said Harry Barton was on said eighteenth day of November, 1885, a minor under the age of twenty-one years, and plaintiff's only child living."

The defect in the switch machinery is stated as follows: "That the spring lever of said switch was too stiff to be used with safety in a switch, and also that said spring lever was screwed up too tight; so that when plaintiff's minor son Harry Barton unlocked said switch as aforesaid and proceeded to open or set said switch by and with said spring lever, said spring lever by reason of the defectiveness aforesaid, caused the handle of said switch, as plaintiff's minor son Harry Barton took hold of and pressed against it to open or set it, to come or fly against him with great force, striking him on the side and belly, then and there, thereby causing immediate death; that it was the duty of said defendant to keep said switch in good condition, that is to say,—said defendant should have oiled the machinery of said switch, and loosened the screw or tap on said spring lever, so that said switch would have been in a safe working condition; all of which said defendant negligently failed to do.

"That said switch machinery was unsafe, defective and unfit for use by reason of not being oiled and by reason of said spring lever being screwed up too tight, and that defendant knew of said defects as aforesaid, or by the exercise of ordinary care and diligence could have known of it."

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The trial resulted in a verdict and judgment for the plaintiff in the sum of fifteen hundred dollars.

The defendant assigns for error that the petition states no cause of action in this, that it fails to state that the plaintiff's son was unmarried at the date of his death. There was no allegation to that effect in the petition, nor was there any evidence tending to prove it. As the action is statutory, and plaintiff's right to sue depends on the fact that the deceased left neither widow nor surviving children, the omission to aver and prove such fact is fatal to plaintiff's recovery. This has been repeatedly decided, and it has been held that the objection is not waived by pleading over, but is sufficiently saved by demurrer to the evidence or motion in arrest. *Barker v. Railroad*, 91 Mo. 86; *Dulaney v. Railroad*, 21 Mo. App. 597.

This of itself necessitates a reversal of the judgment. The defendant contends that the cause should not be remanded because it affirmatively appears by the plaintiff's evidence that the deceased was guilty of contributory negligence, and because it does not appear that the defendant was guilty of any.

The only evidence offered to sustain the charge of defendant's negligence was evidence of the fact that the switch machinery worked hard. There was no evidence whatever tending to show any defect in its original construction, nor that the spring lever was too stiff to be used with safety, nor that it was screwed up too tight, or not sufficiently oiled; nor was there any evidence that the officers or agents of the company knew anything of any latent defects if they had existed. On the other hand, there was affirmative evidence, in the testimony of plaintiff's own witnesses, showing that the deceased voluntarily and unnecessarily assumed a dangerous position in trying to set the switch; that he stood with his belly up to the plate, and could not have been hurt if he stood further back; that he took hold of the lever with one hand, whereby it slipped; that he could have stood out of the way and taken hold of the lever with both

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hands, and it would not have hurt him; that the stiffer a switch is, the safer it is for the operator, as he has to get more out of the way to handle it. In fact, the testimony of the plaintiff's own witnesses is conclusive that if the deceased had exercised the most ordinary care, he could not have been hurt, even conceding that there was some defect in the machinery of the switch.

It appeared further that the deceased had for years prior to this accident been in the defendant's employ, and for a number of months preceding it, was acting as brakeman on a train continually running over this switch, and that he was a very strong, healthy boy over eighteen years of age.

Under these circumstances, the plaintiff's evidence left nothing for the jury to pass upon. There was no dispute about the facts, and it was the duty of the court to declare the only admissible inference from these facts. *Boland v. Railroad*, 36 Mo. 484, 491; *Bell v. Railroad*, 72 Mo. 50, 57. Even if there had been some evidence of negligence on defendant's part, the plaintiff could not recover, since the evidence offered on her part raised a necessary inference of contributory negligence on part of the deceased. *Yarnall v. Railroad*, 75 Mo. 575; *Powell v. Railroad*, 76 Mo. 80.

We see no warrant in the evidence justifying us to remand the cause. Judgment reversed. All concur.

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31 116 LOUISA BEDSWORTH and LAMAR BEDSWORTH, Respond-
93 651 ents, v. JOSEPH BOWMAN, Appellant.

Kansas City Court of Appeals, May 10, 1888.

MARRIED WOMEN—PERSONAL PROPERTY OF UNDER SECTION 3296, REVISED STATUTES—PROCEEDINGS NECESSARY TO SUBJECT IT TO DEBT FOR NECESSARIES—CASE ADJUDGED.—In order to subject the wife's separate property, under the statute (Rev. Stat., sec. 3296), to execution for the payment of her husband's debt, created for necessaries for her or her family, it is necessary to make her a party defendant to the suit in which the judgment is rendered on such debt. And where the judgment is against the husband alone, as in this case, the execution issued upon it was no authority for the sheriff's action in levying upon the separate property of the wife. *Gabriel v. Mullen*, 30 Mo. App. 464, *reaffirmed*. (HALL, J., dissents.)

APPEAL from Lafayette Circuit Court, HON. RICHARD FIELD, Judge.

Affirmed.

Certified to Supreme Court.

The case is stated in the opinion.

WALLACE & CHILES, LESLIE OREAR, and G. M. SEBREE, for the appellant.

I. The court erred in giving the declaration of law numbered one asked for by plaintiffs and objected to by defendant, and in refusing to give the declaration of law numbered one as prayed by defendant. Session Acts 1875, p. 61; *Woodford v. Stephens*, 51 Mo. 443; *Barnes v. Bangert*, 16 Mo. App. 22; *Alexander v. Lydick*, 80 Mo. 341; Rev. Stat., 1879, secs. 3296, 3295; *Sallie v. Arnold*, 32 Mo. 532; *Fisher v. Anchor Line*, 15 Mo. App. 577; *Conrad v. Howard*, 89 Mo. 217.

II. The court erred in overruling defendant's motion in arrest of judgment. Rev. Stat., 1879, secs. 3854, 3856; *State ex rel. v. Dunn*, 60 Mo. 64, and cases cited.

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III. Prior to the passage of the act of 1875 (Sess. Acts, 1875, p. 61) declaring that "any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture by gift, etc., * * * shall, together with the income and profits thereof, be and remain her separate property, and under her sole control, and shall not be taken by any process of law for the debts of her husband," the husband could by simply taking possession or bringing under his control the personal property of the wife become the owner thereof, and render it liable for his debts. *Woodford v. Stephens*, 51 Mo. 443; *Salles v. Arnold*, 32 Mo. 532, 547. And property so under the control of the husband that he might at any time take manual possession of it was such a reduction to possession as gave him the title. *Barnes v. Bangert*, 16 Mo. App. 22; *Alexander v. Lydick*, 80 Mo. 341. And even such act of 1875 and section 3296, Revised Statutes, provide that the same shall not affect the title of the husband to any personal property reduced to his possession; under that act the husband has the right to reduce such personal property to his possession, the modification of his right being that such reduction to possession by him must be with the express assent of the wife in writing—including authority "to sell, encumber, or otherwise dispose of the same." It must be conceded that but for the provisions of the act of 1875, the common law would operate to vest the title to the wife's personalty in possession in the husband absolutely, and in construing this statute the court will not depart further from the common law than the language of the statute requires.

IV. The modifications and conditions of the wife's right to a separate estate in personal property under this act are embraced in these words at the end of the section, viz., "but such property shall be subject to execution for the payment of the debts of the wife contracted before marriage, and for any debt or liability of her husband created for necessaries for the wife or

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family." The separate property of the wife by virtue of the act of 1875, and section 3296, Revised Statutes, 1879, is not a complete separate property, or estate as defined and treated of in equity jurisprudence, but a statutory and qualified separate property, and the legislature had the power to subject it to execution, as it did. *Fisher v. Anchor Line*, 15 Mo. App. 577.

V. This species of legislation is not new in this state. Sess. Acts, 1849, p. 67; Rev. Stat., 1855, chap. 63, p. 754; *Phelps v. Tappan*, 18 Mo. 393, 395. That case arose out of a levy of an execution on the husband's property for debt of wife. *Cunningham v. Gray*, 20 Mo. 170; *Tally v. Thompson*, 20 Mo. 277; *Harvey v. Wickham*, 23 Mo. 112; *Hockaday v. Sallee*, 26 Mo. 219; *Barbee v. Winer*, 27 Mo. 140. The case of *Alexander v. Lydick*, 80 Mo. 341, fully sustains the position of appellant in this case. See also Rev. Stat., 1879, sec. 3295; *Conrad v. Howard*, 89 Mo. 217. The case of *State ex rel. v. Armstrong*, 25 Mo. App. 532, relied on by respondents, and upon which the court below relied in making its finding for plaintiffs in this case, when properly considered, we submit is not in point, and in no wise affects the case at bar.

VI. The Supreme Court, in *Alexander v. Lydick*, *supra*, clearly asserts the validity of the statute and these proceedings, and that is the last controlling decision of that court on this subject, and must prevail over the interpretation given by the court below.

J. D. SHEWALTER and S. N. WILSON, for the respondents.

I. The property being the separate property of the wife, admitted by the pleadings and shown by the evidence, she could not be deprived of it without due process of law, and judgment and execution thereon against her husband, was no process against her or her property. *State ex rel. v. Armstrong*, 25 Mo. App. 532; *Gitchell v. Messmer*, 14 Mo. App. 83; *O'Fallon v. Clopton*, 14 Mo. App. 582; *Dogge v. Stumpe*, 73 Mo. 533; Const. Mo., art. 2, sec. 30; 52 Mo. 44.

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II. While, under the statute, the separate personal property of a married woman is liable "for any debt or liability of her husband created for necessaries," yet the title to the property is in the wife; and the sheriff, being a mere executive officer, has no power to go behind the execution and the judgment and determine the consideration of the judgment, and to settle the judicial question of the existence or non-existence of the exceptional fact which makes the property subject to the payment of the debt which is the foundation of the judgment. The wife is entitled to her day in court, and the only manner in which her separate personal estate can be reached is in equity, or possibly by a suit against both, a judgment against the husband and a judicial determination of the fact by the judgment that it is for necessaries. *Kimball v. Silvers*, 22 Mo. App. 520; *State ex rel. v. Armstrong*, 25 Mo. App. 532; *Kimm v. Weipple*, 46 Mo. 532; *Whitesides v. Cannon*, 23 Mo. 457; *Gage v. Gates*, 62 Mo. 412; *Martin v. Colburn*, 88 Mo. 229; *Bachman v. Lewis*, 27 Mo. App. 81.

III. There was no evidence in this case that the judgment was for necessaries; the judgment being on a promissory note, the consideration of the note (though for necessaries) was merged in the note.

IV. The court did not err in overruling defendant's motion in arrest of judgment. The property in controversy was in possession of plaintiffs under their replevin bond, as was shown by the evidence. Rev. Stat., sec. 3857.

V. The case of *State ex rel. v. Armstrong*, 25 Mo. App. 532, is decisive of this.

WALLACE & CHILES, *et al.*, in reply.

I. The question involved in this case is more a question of the power of the legislature than one of the form of proceeding. The facts set out in the petition are admitted or not controverted.

II. The only question is, whether the legislature could, and did, by the act of 1875 (Sess. Acts 1875, p.

61), and Revised Statutes 1879, section 3296, in changing the law as to a married woman's personal property, and in making it her "separate property," and in exempting it from liability, "to be taken by any process of law for the debts of her husband," so qualify such exemption, by a proviso, as to make such statutory separate property "subject to execution * * * for any debt or liability of her husband created for necessaries for the wife or family;"—for this is what the legislature purports to do, and we submit, could do, and have done. There is nothing unconstitutional in the act.

III. If the legislature could create a separate property in personal property, in a married woman—it certainly could prescribe the conditions, and require the married woman to take it, *cum onere.* Under section 2353, Revised Statutes, 1879, the Supreme Court have repeatedly held, that "personal property" is "subject to execution," on a judgment "for the purchase price thereof," against the purchaser, "even in the hands of a third person"—"except in the hands of an innocent purchaser for value without notice." *Parker v. Rodes*, 79 Mo. 88. And in this case, it was even held error to join the third party in the suit. See also, *Norris to use v. Brunswick*, 73 Mo. 256, where section 2353, Revised Statutes, is held to have "a much broader scope" than the act of 1874. In *Milling Co. v. Turner*, 23 Mo. App. 103, this court not only reaffirms the doctrine of *Parker v. Rodes*, *supra*, but holds that the claim of a plaintiff in a judgment for the purchase price of personal property is superior to, and overrides prior attachments by other creditors, and this court there say, "it is clear that the Supreme Court entertains the opinion, that this statute should be so construed as to carry out the object for which it was enacted;" and if so, why should not the statute be so "construed as to carry out the object for which it was enacted?"

IV. The statute must be taken altogether, and a married woman cannot claim the benefit of a part of it, and ignore the balance; if so, why may she not ignore

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the part thereof, giving title to the husband, of personal property of the wife, "reduced to his possession, with the express assent of his wife"? It is not perceived why it is necessary to bring the wife into court by process, before the creditor can enforce, by execution, the collection of his debt against the husband, created for necessaries for the wife or family, out of the personal property of the wife, any more than it would be necessary to bring into court by process subsequent purchasers of personal property, liable for its purchase price, before an execution could be levied on the same; but the authorities, above cited, show that that is not necessary.

V. If personal property of a married woman should be levied upon, in a case where it is not liable for the debt of the husband created for necessaries for the wife, or family, under this statute, the question could be raised and determined in a suit by replevin, or by proceedings under the statute, and in that way the wife would have her "day in court," and "due process of law," required by the decision in *State ex rel. v. Armstrong*, 25 Mo. App. 532. For similar legislation, see Sess. Acts 1849, and Rev. Stat., 1855, chap. 63; Sess. Acts 1881, p. 61; *Phelps v. Tappan*, 18 Mo. 393, 395.

VI. In *State ex rel. v. Armstrong*, *supra*, what would it have availed, if Mrs. Sharp had been summoned before the justice of the peace, in the suit against her husband, Charles H. Sharp? A judgment at law against her, a married woman, would have been a nullity; and the justice had no equity jurisdiction to subject by judgment, or decree, her personal property to the payment of the debt, even if it appeared to be for necessaries for her.

VII. But we contend that the right to subject her personal property "to execution" for the debt of the husband for necessaries for the wife or family, being statutory, there is no provision or ground to institute equitable proceedings for that purpose even in the circuit court. The statute subjects it to execution without

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suit against her. And the questions as to whether such property was the statutory separate property of the wife, or as to whether the debt was created for necessaries for the wife, etc., if denied, would have to be raised by a replevin suit, or by proceedings under sections 2366 and 2367, Revised Statutes. It is a matter of defence to the levy, not to the suit.

VIII. The cases of *Gage v. Gates*, 62 Mo. 412, and *Lincoln v. Rowe*, 64 Mo. 138, cited in *State ex rel. v. Armstrong*, *supra*, are not in point.

HALL, J.—The defendant as sheriff had levied on certain personal property under an execution issued on a judgment against Lamar Bedsworth for a debt created for necessaries for his wife, Louisa Bedsworth, and her family. The wife was not a party to the suit in which the judgment was rendered. The property seized by the defendant was, under section 3296, Revised Statutes, but not otherwise, the separate property of the wife. This action was instituted by the wife and the husband for the claim and delivery of the wife's property thus seized and detained by the defendant.

The section of the statute above mentioned, after declaring what personal property belonging to a married woman shall be her separate property, provides as follows: "But such property shall be subject to execution for the payment of the debts of the wife contracted before marriage, and for any debt or liability of her husband, created for necessaries for the wife or family." The circuit court held that, in order to subject the wife's separate property under the statute to execution for the payment of her husband's debt created for necessaries for her or her family, it is necessary to make her a party defendant to the suit in which the judgment is rendered on such debt, and that, therefore, the execution in this case was no authority for the defendant's action in levying upon and detaining the separate property of the female plaintiff.

This court has, in the case of *Gabriel v. Mullen*, 30

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Mo. App. 464, announced the same conclusion. The subject is fully discussed in that case, and the process necessary to subject the wife's separate property to the payment of the husband's debt for necessaries for her or her family is therein pointed out. I dissented from the opinion of the majority of the court in that case. The judges concurring in that opinion still adhere to it, and in accordance with it the judgment of the circuit court will be affirmed.

From this conclusion I dissent because I think it essentially wrong and because I believe it in conflict with *Alexander v. Lydick*, 80 Mo. 341.

The result is that the judgment of the circuit court is affirmed, but since I think this result in conflict with the decision of the Supreme Court in *Alexander v. Lydick*, *supra*, it is ordered that the original transcript and all other papers on file in this case be certified to the Supreme Court in order that the case may be there finally determined, and that all proceedings on the judgment of this court be stayed until the final determination of the case by the Supreme Court.

D. A. PECK, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

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Kansas City Court of Appeals, May 10, 1888.

1. PRACTICE—PROVINCE OF JURY—CASES WHERE COURT MAY INTERFERE.—Whenever, from all the facts and circumstances in evidence, a jury may, without doing violence to the dictates of reason and common sense, infer a given fact on account of its known relation to the fact proven, the court should not interpose its own different conclusion. But the due protection of property rights demands that the court should draw the line between tangible evidence and reasonable, legitimate deductions, and mere conjecture or speculation.

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2. ——— EVIDENCE TO JUSTIFY A VERDICT—CHARACTER OF.—While the law does not require positive proof, it does require such proof as will leave no reasonable doubt of the existence of the fact upon which the verdict must rest.

APPEAL from Cass Circuit Court, HON. CHARLES W. SLOAN, Judge.

Reversed and remanded.

Motion for rehearing denied.

The case and facts are stated in the opinion of the court.

ADAMS & BOWLES, for the appellant.

I. The action of the circuit court in setting aside the first judgment rendered without any motion made therefor, and rendering another judgment, was unwarranted by law; and the pretended judgment is void. *Smith v. Best*, 42 Mo. 185; *Lawther v. Agee*, 34 Mo. 372; *Brackett v. Brackett*, 61 Mo. 221; *Henry v. Gibson*, 55 Mo. 571. The statutes provide for what causes a finding or judgment may be set aside. No such proceedings were had in this case as are authorized by the statute. Rev. Stat., sec. 3704; *Nelson v. Ghiselin*, 17 Mo. App. 665; *State ex rel. v. Adams*, 84 Mo. 316.

II. The evidence in this case was insufficient to make out even a *prima-facie* case, and the court erred in refusing to declare the law as prayed by defendant in instructions numbered one, two, three, and four. *Sheldon v. Railroad*, 29 Barb. 228. The evidence in this case scarcely raises a suspicion that the fire was caused by defendant. A freight train passed through plaintiff's farm, and about an hour, or an hour and a half afterwards, some parties, traveling along the railroad track, discovered a fire burning on the edge of the right of way, and in plaintiff's field. There was no evidence of the escape of any fire from the locomotive. It is possible that the fire may have been caused by the passing

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freight train; it may have been set by some one passing along the track, or it may have occurred in many other ways. The evidence is silent, however, as to the manner in which it did actually occur. To hold the defendant liable upon such evidence is simply to say that if a casualty occurs along the railroad, or near it, though the company be engaged in the lawful use and operation of its property, it is responsible for what it may have done, without the least proof that it, in any manner, caused the damage. There should be something more than a mere suspicion or possibility that it caused the injury before it should be mulcted in damages.

No brief for the respondent.

PHILIPS, P. J.—This is an action to recover damages alleged to have been done to plaintiff's fence and meadow by fire negligently communicated thereto by one of defendant's passing locomotives. The plaintiff recovered judgment; and the important question arising on this appeal is, whether or not there was sufficient evidence introduced by plaintiff to support the verdict.

The plaintiff testified as to his ownership of the property destroyed, and the extent of the damage. He was not at home when the fire occurred, and did not even see the fire. The only witness whose evidence bears upon the question of the communication of fire was John Mercer, who testified as follows: "I saw one fire in Mr. Peck's field, on north side of railroad; I can't just give the date of it; I saw the fire on the north side of the railroad along in October, 1886; I was coming along on the hand-car at the time; I was working on the section for the Missouri Pacific railroad at that time; we were coming east on the hand-car towards Strasburg; we were coming from the direction of Pleasant Hill; as we were coming east on the hand-car, it was some time in October last year, we met a freight train on the Missouri Pacific railroad a mile and a half west of where the fire was; the train was going west,

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and we were coming east; we took our car off the track and let the train pass; after the train had passed, we put the car on the track again and started on east; after we had gone a mile and a half from where we met the train we came to where the railroad runs through Mr. Peck's field; when we got there the fire was burning on the edge of the right of way, and was spreading towards his meadow and field; we stopped, and tried to put it out; the fire had burned along on the right of way and in the field adjoining the railroad; the fire seemed to have started on the right of way; I did not see it start, but from the fact that it had burned some of the weeds on the right of way, it looked to me as though the fire had started on the edge of the right of way. The grass was very dry; the wind was blowing pretty smart from the south. Before the fire occurred, think the grass on the right of way had been mowed, but not burned."

I. It is ever, or should be, with reluctance that courts interfere with the province of juries, or with the court sitting as a jury, as in this case, in passing upon questions of fact. Whenever, from all the facts and circumstances in evidence, a jury may, without doing violence to the dictates of reason and common sense, infer a given fact on account of its known relation to the fact proved, the court should not interpose its own different conclusion. But while this is correct, the due protection of property rights demands that the court should draw the line with a firm hand between tangible evidence and reasonable, legitimate deductions, and mere conjecture or speculation.

In this case there was no proof that any fire was seen to escape from any engine or train of cars on defendant's road, at or about the time in question. The only proof was that a freight train on defendant's road was seen one mile and a half from the fire going west. What time that train passed the given point, in relation to the appearance of the fire, is not disclosed. Whether

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the train had stopped at any point, or had run continuously over the intermediate space, or at what rate of speed it was running when seen, are matters not developed. How long did it occupy in covering the mile and a half? How long did it take the car-men to replace the hand-car on the track, and to run the mile and a half before the witness Mercer discovered the fire? There was absolutely no evidence of these facts; and the jury, or the court, were left entirely to mere conjecture and guess as to these important facts.

Then again the court was left entirely in the dark as to how long the fire had been burning when Mercer discovered it. It may, so far as this record discloses, have been burning when the freight train passed that point. The burden of proof rested on the plaintiff to make out his case. There was no evidence to the effect that just before the passing of defendant's engine no fire was seen at that point, by a person having an opportunity to see it. Nor was there any evidence that immediately after the train passed the fire appeared on the track.

In *Kenney v. Railroad*, 70 Mo. 245, 252, this question of sufficiency of evidence is elaborately considered. There the evidence showed that just before the engines passed there was no fire on the track, and that immediately thereafter, fire appeared. It was held that there was such "known and experienced connection subsisting between the collateral facts, or circumstances, satisfactorily proved, and the fact in controversy," as to justify the submission of the case to the judgment of the jury. The illustration given by the learned judge who wrote the opinion, of a person passing through a meadow conveying fire in a vessel, from which sparks, without due caution, might escape, and immediately thereafter a fire is discovered springing up in his wake, shows the proper application of the rule of legitimate inference for the jury to make. But no such facts, or their cognates, were in proof here.

The case of *Sheldon v. Railroad*, 29 Barb. 226,

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alluded to in the opinion, *supra*, is more allied, in its facts, to the case at bar. There the plaintiff's mill, within sixty-seven feet of the railroad track, with its windows open, and highly inflammable material within, was discovered to be on fire in about one hour and seventeen minutes after an engine had passed. No one saw any sparks emitted from the engine. Nor was there any proof that just before the engine passed no fire was observed about the mill. The court held the evidence to be insufficient to support a verdict. The court say: "These facts, standing alone, do no more than make out a possible case that possibly the fire proceeded from defendant's locomotive. It is not enough for plaintiff to show a possibility that the fire was communicated to the mill by sparks emitted by defendant's locomotive. He cannot recover upon a possibility. Even if the evidence went further and brought the fact sought to be proved within a probability, still the plaintiff must fail; because to justify a verdict, the law requires, not positive proof it is true, but such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest. The rights of property, and all claims to its possession and enjoyment, are dependent upon the existence of certain facts. And when they are disputed and become the subject of judicial investigation, if juries could assume their existence, without sufficient evidence and render verdicts upon possibility, probability, and conjecture, the courts would be shorn of their legitimate authority, and the wise and just rules of common law, as they have been recognized and applied from time immemorial, would lose their principal value."

There were so many other means by which the fire in question may have originated, within the range of possibility, and probability, as to render a judgment against the defendant too conjectural on the evidence adduced by the plaintiff.

Under the view entertained of the merits of this case, it is unnecessary to discuss other errors assigned by the appellant. The demurrer to the evidence should

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have been sustained. The judgment of the circuit court is reversed, and the cause is remanded. All concur.

On motion for rehearing.

PER CURIAM.—It is assigned, first, as ground, for granting a rehearing herein, that the court erred in overruling respondent's motion to dismiss the appeal on the ground that appellant had failed to file an assignment of errors. That motion was denied because as a matter of fact appellant did file an assignment of errors on and before the cause was submitted, and on the same day it was set for hearing, it being the first day of the term on which the case was set for hearing on the docket. This was sufficient. Rev. Stat., sec. 3764.

It is next assigned as ground for granting a rehearing that the opinion of the court is contrary to the provisions of section 810, Revised Statutes, as amended in 1883. Laws, Mo. 1883, pp. 50, 51. The amendment presumably referred to is the provision which requires railroad companies to cause dead and dry vegetation and undergrowth upon their right of way to be cleared off and burned, and making the companies liable for all damages done by the neglect of such duty. It is a sufficient answer to this suggestion to say, that the action is not predicated of this statute. It is based on the negligence of defendant in operating its railroad with defective machinery and carelessly and negligently setting fire to plaintiff's fences and meadow. It could not be maintained seriously, we presume, by counsel that under this petition he could recover judgment by merely proving the fact that grass, etc., remained upon defendant's right of way. This is too clear to require any citation of authorities.

We might with propriety have reversed this cause without remanding it; but concluded to remand the same to enable plaintiff, if he could, to supply the essential proofs. The motion is denied.

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ISAAC METZENBERGER *et al.*, Respondents, v. J. W. KEIL, Appellant.

Kansas City Court of Appeals, May 10, 1888.

ATTACHMENT—APPEAL FROM JUDGMENT ON PLEA IN ABATEMENT—PRACTICE PRIOR AND SUBSEQUENT TO 1879.—Prior to the revision of 1879 (in suits in attachment) no appeal would lie from a judgment on a plea in abatement. Since then, under section 439, Revised Statutes, it is permitted to a plaintiff, against whom judgment has gone on the plea in abatement, to take an appeal therefrom without awaiting final judgment on the merits. But where the judgment goes against the defendant on such plea, he must save his exceptions thereto, file bill of exceptions, and await the judgment on the merits before he can appeal.

APPEAL from Henry Circuit Court, HON. D. A. DEARMOND, Judge.

Appeal dismissed.

The case is stated in the opinion.

MCBETH & LADUE, for the appellant.

No brief for the respondents.

PHILIPS, P. J.—This is an action by attachment. The issue was tried on the plea in abatement, and found for the plaintiffs. From the judgment rendered thereon, and before any judgment on the merits, the defendant appealed.

Prior to the revision of 1879, it was held that no appeal would lie from a judgment on a plea in abatement. *Davis v. Perry*, 46 Mo. 449 ; *Jones v. Snodgrass*, 54 Mo. 597. Under section 439, Revised Statutes, 1879, it is permitted to a plaintiff, against whom judgment has gone on the plea in abatement, to take an appeal therefrom without awaiting final judgment on the merits. But where the judgment goes against the defendant on such plea, he must save his exceptions

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thereto, file bill of exceptions, and await the judgment on the merits before he can appeal. *Fagley v. Vail*, 11 Mo. App. 601; *Duncan v. Forgey*, 25 Mo. App. 310; *Hicks v. Martin*, 25 Mo. App. 365.

It follows that the appeal in this case was prematurely taken, and the same is dismissed. All concur.

JOHN C. GUINN, Respondent, v. JACOB BOAS, *et al.*, Appellants. 31 131 96 601

Kansas City Court of Appeals, May 10, 1888.

PRACTICE—RULES OF COURT ESSENTIAL—RULE FIFTEEN OF THIS COURT—ASSIGNMENTS OF ERROR—REQUIREMENTS FROM ONE MAKING.—The rules of this court were made pursuant to authority conferred upon it by statute and the common law. They are essential to the orderly and prompt disposition of all causes in court. Rule fifteen has repeatedly been construed and enforced in published opinions of the court. He who assigns error must make that error apparent; he who wishes to reverse anything done by the court below must show it to be wrong. *Held*, that the record in this case fails to show any reversible error.

APPEAL from Jasper Circuit Court, HON. M. G. MCGREGOR, Judge.

Affirmed.

The case is stated in the opinion.

HAUGHAWONT & GRAY, for the appellant.

The point that the appeal should be dismissed for the failure to set out all the evidence in our brief and abstract of the record is not well taken. We understand the only object of this rule is, that in case respondent files no brief then this court will not have to go to the transcript and look over a lot of non-essential matter

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to obtain the desired information. Appellants' statement and abstract of the record sets out *in haec verba*, all the evidence of any ratification as required by law, that was introduced in evidence, and were it not for the incorrect and misleading statements made in respondent's brief it would not be necessary for the court to go to the transcript to reverse this judgment. We could, in this reply, set out the evidence complained of in respondent's brief, but as we differ so materially as to what the evidence is, it will be necessary for the court to examine the transcript.

Phelps & Brown, for the respondent.

I. Defendants' appeal should be dismissed, because appellants have failed to comply with rule fifteen of this court, which requires that every part of the transcript relied upon as error, and all that is necessary to show it such, must be printed in the abstract. When no point is made on the sufficiency of the evidence, it will be enough to set forth its tendency. But when the sufficiency of the evidence is questioned, so much of the transcript as contains all of the evidence on that question must be set out in the transcript *in haec verba*. *Goodson v. Railroad*, 23 Mo. App. 73; *Hausmann v. Hope*, 20 Mo. App. 173.

II. The controlling question in this case, and the only point made by appellants, is, that the evidence was not sufficient to show a ratification by defendant on attaining majority of his note made during his minority. The appellants should have set out in their abstract *in haec verba* so much of the transcript as contained all the evidence on that question. Such evidence is of vital importance in determining whether or not the action of the trial court in refusing to sustain defendants' demurrer to the testimony was warranted; and yet appellants' counsel have not deemed it of sufficient importance to set out in their abstract the evidence.

III. The court will not go to the transcript to ascertain what the evidence tended to show, when, as in this

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case, not even the substance of it is set out in the abstract; in such case, every reasonable intendment is to be indulged in favor of the correctness of the judgment of the trial court. *Hausmann v. Hope*, 20 Mo. App. 193. Had the appellants set forth the evidence as contained in the transcript, it would have disclosed the fact that the note in controversy was given, and that appellant arrived at majority and fully ratified and affirmed said note, long before the passage of the law of 1879 requiring the ratification to be in writing, and that, before the commencement of this action, the appellant wrote plaintiff a letter admitting his liability on said note and agreeing to pay the same, and further, that the question of ratification in writing was not raised on the trial in the court below. A party will not be permitted to try a case on one theory in the trial court, and, after having lost, insist upon a reversal here on the ground that the instructions given did not comport with a theory on which the case was not tried. *Bank v. Armstrong*, 62 Mo. 65; *Bank v. Armstrong*, 92 Mo. 265.

PHILIPS, P. J.—The rules of this court were made pursuant to authority conferred upon us by statute and the common law. They are essential to the orderly and prompt disposition of causes in court. They are published conspicuously in each volume of the reports. Rule fifteen has repeatedly been construed and enforced in published opinions of the court. So that no reasonable excuse can exist for its nonobservance by attorneys bringing causes here for review; and no just criticism can be made by parties of the action of the court in again respecting its rules, whereby a litigant may have his appeal sent out of court without having the errors complained of reviewed and determined.

It is claimed, for instance, by appellants that this action, being founded on the contract of a minor defendant, he could only be bound on proof of a ratification after he attained his majority. The appellants claim

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that there was no sufficient evidence of this fact; while the respondent insists there was. And yet the evidence, nor the substance thereof, in its entirety, bearing on this issue is not set out in the abstract. He who assigns error must make that error apparent; as "that which the court did is to be taken to be right, till the contrary appears; this is the rule, he who wishes to reverse anything done by the court below, must show it to be wrong." *Foster v. Nowlin*, 4 Mo. 23. For aught we know, from the printed matter furnished us by the appellants, the evidence on this issue may have been amply sufficient to support the verdict, and so much so as to warrant us in saying that the verdict and judgment were so manifestly for the right party as to forgive any technical errors committed by the court in the progress of the trial.

We cannot, on a mere issue of fact, accept the deductions made by counsel from the evidence; but we must have the whole of the evidence bearing on such issue, as preserved in the bill of exceptions. Criticism is made of the action of the court in passing on certain instructions, without setting out all the instructions given. For aught we know from anything furnished us in the printed paper by appellants, the law may have been properly declared in the series of instructions given. *Wilkerson v. Railroad*, 26 Mo. App. 149, 150. Nor could we safely determine the propriety and correctness of any instruction as applied to a question of fact without knowing the state of the proofs in detail.

It follows that the judgment must be affirmed, as we fail to find any reversible error in this record. All concur.

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J. P. SMITH, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Appellant. 31 135 157s 487 157s 492

Kansas City Court of Appeals, May 10, 1888.

CHANGE OF VENUE—PROVISIONS FOR, IN CIVIL CASES PRIOR TO AND SINCE 1879.—Prior to the Revised Statutes of 1879 the provision of law, as to change of venue in civil cases, was thus: "Any party in such cause may present to the court, or the judge thereof in vacation, a petition setting forth the cause of his application for a change of venue; and shall annex thereto an affidavit to the truth of the petition; and allege that he has just cause to believe that he cannot have a fair trial on account of the cause alleged." (Gen. Stat., 1865, p. 684, sec. 3. In the revision of 1879 (Rev. Stat., sec. 3732), said section three, of the statute of 1865, was amended by inserting after the words "a petition setting forth the cause of the application for a change of venue," the following, "and when he obtained his information and knowledge of the existence thereof." *Held,* that the application, in this case, does not comply with the law; and to entitle a party to such change he must comply with all the substantial requirements of the statute, the right to a change of venue being purely statutory.

APPEAL from Jasper Circuit Court, HON. M. G. McGREGOR, Judge.

Affirmed.

The case is stated in the opinion.

E. D. KENNA and E. C. O'DAY, for the appellant.

I. Section 3729, Revised Statutes, provides that "a change of venue may be awarded in any civil suit to any court of record," for any one of the statutory reasons; and this case, being a civil case, comes under its provisions. 25 Mo. 526. It also applies to a cause instituted before a justice of the peace and appealed to the circuit court and has been so held repeatedly in this state. The case of *Smith v. Monks*, 25 Mo. 107, was brought before a justice of the peace of Howell county, and from there

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appealed to the circuit court of said county, from which the cause was removed by change of venue to the circuit court of Ozark county, and from the last-named court the venue was again changed and the case removed to the circuit court of Webster county, where a trial was had and a judgment rendered, from which an appeal was taken to the Supreme Court. The Supreme Court affirmed the judgment of the trial court and overruled appellant's objection that the trial court had no jurisdiction of the cause. In the case of *Yalabusha Co. v. Corby*, 11 Miss. 529, on appeal from the board of police, the cause was carried into the circuit court of Yalabusha county, and on application the venue was changed to the county of Carroll, where a trial occurred, from which court a writ of error was sued out to the High Court of Errors and Appeals. The latter court reversed the trial court for the reason that the change of venue was not authorized by law. The statute of Mississippi (Howard & Hutchison 1840, p. 592) authorizing a change of venue is as follows: "When either party to any civil action instituted in a circuit court of this state shall desire to change the venue, he, she, or they shall make oath," etc. This statute authorizing the change is restricted in its very terms to actions instituted in a circuit court. The Mississippi statute uses the language "when either party to any civil action instituted in a circuit court of this state desires to change the venue he, she, or they shall make oath," etc., while our statute uses the language, "a change of venue may be awarded in any civil suit to any court of record for any of the following causes," etc. The one statute expressly prohibits the awarding of a change of venue except in causes instituted in a circuit court, while the other expressly provides "that a change of venue may be awarded in any civil suit to any court of record." Any construction of section 3729, Revised Statutes, 1879, which restricts it to cases instituted in the circuit court does violence, not only to its terms and spirit, but also to reason and common sense.

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II. The lower court erred in overruling plaintiff's application for change of venue. The application complied with the provisions of the statute both as to recitals and verifications, and the court had no discretionary power in the matter, but was bound to grant the prayer of appellant for a change of venue. The statute leaves no discretion to the court to refuse to change the venue. The mandate of the statute, when its requirements have been observed, is peremptory. The court has no discretion, and when a party moving for a change of venue brings himself within its provisions, he is entitled to its benefits, and he is not dependent upon the caprice of the trial judge. The court must grant the change of venue. *Frelegh v. State*, 8 Mo. 607; *Reed v. State*, 11 Mo. 380; *Dowling v. Allen*, 88 Mo. 293; *Mix v. Kepner*, 81 Mo. 93; *Shattuck v. Meyers*, 13 Ind. 46; 36 Iowa, 68; 7 Wis. 155; *Edwards v. State*, 25 Ark. 445. "It is error to overrule a motion for a change of venue in a civil case where the affidavit on which the motion is based conforms to the statute." "The court has no discretion in civil suits." *Walsh v. Ray*, 38 Ill. 31.

III. Reasonable notice of the application for change of venue was given, and this is all that is required by the law. *Reed v. State*, 11 Mo. 379; *Corpenny v. Sedalia*, 57 Mo. 88.

IV. The application was not too late. *Hewger v. Kipp*, 31 Kan. 636; *Corpenny v. Sedalia*, 57 Mo. 88; *Hoke v. Applegate*, 88 Ind. 530.

THOMAS & HACKNEY, for the respondent.

I. The pretended notice was, in fact, no notice. It was proper for the court to disregard it as being neither reasonable nor sufficient. No date was specified at which the application would be made.

II. The application came too late. The filing of the affidavit and bond for appeal with the justice was an entrance of appearance in the case by the appellant. Sess. Acts, 1885, p. 187. The appellant was then in court for all purposes, and if the inhabitants of the county

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were prejudiced against appellant, it could have given notice and made application for change of venue to the circuit judge in vacation. Rev. Stat., 1879, secs. 3732, 3733. "When cause for change of venue exists, the application should be made at the earliest opportunity; and if the knowledge thereof is acquired in vacation, the application should be made to the judge at chambers." *Moss v. Johnson*, 22 Ill. 633; *State to use v. Matlock*, 82 Mo. 457. There is nothing in the application to indicate that the appellant did not have knowledge of the cause for a change prior to the first day of the term of the circuit court. The appellant certainly had knowledge of the existence of the cause for a change, if any existed, on the first day of the term when the pretended notice was given, and the application should have been made earlier than the third day of the term, when the cause was for trial, and witnesses had been subpœnaed and were in attendance. And as to whether the application was filed in time was a question resting in the sound discretion of the trial court. *State to use v. Matlock*, 82 Mo. 457.

III. The application is insufficient in averments. Neither the petition nor the affidavit sets forth when appellant obtained its information and knowledge of the existence of the alleged prejudice of the inhabitants. Prior to the revision of 1879, the statute did not require the applicant to state when the information and knowledge of the existence of the cause alleged was received. Gen. Stat., 1865, p. 634, sec. 3. But since the amendment of 1879, this must appear either in the petition or affidavit in every such case. Rev. Stat., sec. 3732. The right to change of venue is purely statutory, and to authorize a change the party applying must comply with all the terms of the statute. *Huthsing v. Maus*, 36 Mo. 108; *Lervin v. Dillie*, 17 Mo. 298.

IV. The application was not sworn to as the statute requires. It does not appear that it was sworn to before an officer whose term of office had not expired. Rev. Stat., sec. 6462.

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PHILIPS, P. J.—The only question presented by this appeal for our determination is, whether or not the circuit court erred in denying a change of venue to the defendant. The application is as follows: "The defendant above named prays the court to grant it a change of venue in the above entitled cause, and for grounds of such change said defendant states that the inhabitants of said county of Jasper are prejudiced against the defendant herein." The affidavit is as follows:

"W. H. Phelps being duly sworn, on his oath states that he is the attorney for the above named defendant and has the sole and entire management of said cause for and on behalf of said defendant corporation, and that the facts stated in the above petition are true and that he has just cause to believe and does believe that the said defendant cannot have a fair trial in said Jasper county, on account of the cause alleged

"W. H. PHELPS."

The court refused to grant the application. On trial, judgment went for plaintiff, and defendant has appealed.

The appellant asserts in its brief here that the court assigned as a reason for denying the application that the statute authorizing changes of venue in the circuit court applies only to cases originating in the circuit court, and not to the instance of cases coming by appeal from justices' courts. There is nothing in the record to indicate the grounds of the action of the court; and plaintiff contends it was based on the insufficiency of the notice and application. We can only consider the case as it appears of record.

Prior to the Revised Statutes of 1879 the provision of law applicable to such cases read as follows: "Any party in such cause may present to the court, or the judge thereof, in vacation, a petition, setting forth the cause of his application for a change of venue, and shall annex thereto an affidavit to the truth of the petition, and allege that he has just cause to believe that he cannot

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have a fair trial on account of the cause alleged." Gen. Stat., 1865, p. 634, sec. 3. In the revision of 1879 (sec. 3732) said section of the statute of 1865 was amended by inserting after the words, "a petition setting forth the cause of the application for a change of venue", the following, "and when he obtained his information and knowledge of the existence thereof." It will be observed that neither the petition nor the affidavit in question contain the words last quoted. It is not necessary to inquire into the policy or motive of the legislature in interpolating these words into the statute. It is sufficient for the courts to know that the statute is so written; and it presents a case where the statute must stand for a reason. *Young v. Glasscock*, 79 Mo. 578. This is the only section of the statute, aside from section 3731 (which has no application to the facts of this case), which prescribes what the petition shall contain and recite. The right to a change of venue is purely statutory, and to entitle a party to such change he must comply with all the substantial requirements of the enabling act. *Huthsing v. Moss*, 36 Mo. 107-8. This radical defect in the petition was sufficient to justify the action of the court in refusing the application. It is, therefore, unnecessary to search out or consider other grounds of objection.

It follows that the judgment is affirmed. All concur.

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BETSY M. MILLS and GEORGE P. MILLS, Respondents, v. THE CITY OF CARTHAGE, Appellant.

Kansas City Court of Appeals, May 10, 1888.

1. **PRACTICE — PARTIES — HOW OBJECTION AS TO TAKEN — CASE ADJUDGED.—Where the fact called in question did not appear on the face of the petition (as in this case), the objection had to be taken by answer; and if it was not so taken (as it was not here), it must be deemed waived. A general denial does not raise the objection; it must be specifically raised by the answer.**

2. **——— INSTRUCTIONS—DIFFERENT THEORIES PRESENTED BY—FINDING NOT LIMITED TO A SINGLE THEORY EXCLUSIVELY.—Where two instructions are given, each presenting a different theory upon which recovery is based, the right to recovery is not limited to the theory presented by one instruction, but extends to either or both.**

APPEAL from Jasper Circuit Court, HON. M. G. MCGREGOR, Judge.

Affirmed.

The case is stated in the opinion

J. D. PERKINS, for the appellant.

I. The plaintiffs rest their case upon the fact that the city had notice of the defect in the sidewalk, and it is necessary to show that in order to recover. *Yocum v. Town*, 20 Mo. App. 489.

II. The court, by its instruction, having declared that the street commissioner was the officer of the city whose duty it was to look after the streets, and the jury having found that he did not have notice, the court should have granted a new trial.

III. There being no evidence that plaintiff George P. Mills is the husband of Betsy Mills, judgment should not have been rendered in his favor, and when the question was raised by the demurrer to the evidence and the motion in arrest, plaintiff should have dismissed as to him.

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ROBINSON & CROW, for the respondent.

I. It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon with ordinary care and caution. And if a city knows of the dangerous condition of its sidewalks and neglects to fix them, it is liable to one injured by reason of its negligence in this behalf. *Carrington v. St. Louis*, 89 Mo. 208; *Bonine v. Richmond*, 75 Mo. 437; *Barrett v. St. Joseph*, 53 Mo. 290; *Bowie v. Kansas City*, 51 Mo. 454; *Russell v. Columbia*, 74 Mo. 480; *Kilroy v. City*, 87 Mo. 103.

II. And notice to the officers and agents of the city is notice to the city itself. *Carrington v. St. Louis*, 89 Mo. 208; *Bonine v. Richmond*, 75 Mo. 437.

III. And actual knowledge of the defective condition of a street or sidewalk is not necessary to fix the liability of a city for injuries resulting from a defective street or sidewalk. *Bonine v. Richmond*, 75 Mo. 437; *Yocum v. Trenton*, 20 Mo. App. 489.

IV. The law will raise the presumption that the city knew the defective condition of the walk, if the defect had existed for such a length of time that the city might have known it by the exercise of that care and diligence due from its servants in looking after and inspecting its streets and sidewalks. *Yocum v. Trenton*, 20 Mo. App. 489; *Sullivan v. Oshkosh*, 13 N. W. Rep, 468.

V. It is not essential that an instruction which undertakes to define the rule of liability in a case shall state all the exceptions to the rule. If these are correctly stated in one or more separate instructions, it is sufficient. *Sewing Machine Co. v. Railroad*, 71 Mo. 203. The charge should be taken together and if, when so considered, it fairly presents the law, and is not liable to misapprehension, a cause should not be reversed because some one of the instructions may not lay down the law with sufficient qualification. *Yocum v. Trenton*, 20 Mo. App. 489; *Rice v. Des Moines*, 40 Iowa, 641

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VI. Plaintiff Betsy M. Mills is authorized to sue and recover in her own name as a *feme sole* for any violation of her personal rights. Acts of Mo. 1883, p. 113. This court, as well as the lower court, can dismiss as to G. P. Mills, if necessary. *Miller v. Harriman*, 84 Mo. 318; *Crunchon v. Brown*, 57 Mo. 38; *Will v. Severin*, 66 Mo. 617; Rev. Stat., secs. 3570, 3582, 3583.

VII. An appeal, wholly without merit, justifies the conclusion that it was taken for delay, and the judgment will be affirmed with ten per cent. damages. *Schwarer v. Boiler Co.*, 19 Mo. App. 534.

VIII. Especially is this so where no question of law, as to which there ought to be no doubt, arises in the case. *Smith v. White*, 17 Mo. App. 443; *Morrison v. Lehew*, 17 Mo. App. 663; *Utz v. Hoerr*, 20 Mo. App. 36; *Osborne v. Oliver*, 23 Mo. App. 667; *Cordell v. Bank*, 64 Mo. 600.

HALL, J.—This was an action by the plaintiffs, as husband and wife, to recover damages for an injury received by the wife, occasioned by a defective and unsafe sidewalk, on one of the defendant's streets. The plaintiff had judgment which the defendant seeks to have reversed on two grounds, viz.: (1) Because there was no proof that the plaintiffs were husband and wife; (2) because the plaintiffs rested their case upon the fact that the city had actual notice of the defective sidewalk, and that the jury in their special findings found that the street commissioner, to whom the court declared notice had to be brought, did not have notice.

I.

The first ground assigned for reversal is in effect the objection that there was an unnecessary party plaintiff. This objection, since the fact did not appear upon the face of the petition, had to be taken by answer, and if it was not so taken it must be deemed waived. Rev. Stat., secs. 3515, 3519; *Dunn v. Railroad*, 68 Mo. 279;

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Reugger v. Lindenberger, 53 Mo. 365; *State to use v. Sappington*, 68 Mo. 457; *Horstkotte v. Meier*, 50 Mo. 160. The answer was a general denial, and did not raise the objection under consideration. The objection "must be specifically raised by answer, otherwise it is deemed to be waived." *Randolph v. Railroad*, 18 Mo. App. 614. For these reasons the first ground assigned for reversal must be held to be untenable.

II.

The second ground assigned for reversal is equally untenable. A sufficient reason for this opinion, without saying more, is that it is based upon a misconception as to the facts. The plaintiffs did not base their case upon the fact that the city had actual notice of the defect complained of. In one instruction the court declared the effect of actual notice of such defect had by the city's street commissioner, but did not limit the plaintiffs' right to a recovery to the finding by the jury that said street commissioner had had such notice. On the contrary, the court in another instruction expressly declared that actual notice had by the city was not necessary to the plaintiffs' right to a recovery, and defined and stated the effect of constructive notice by the city of the defect complained of, from its long-continued existence. The verdict of the jury must have been found in accordance with the instruction last mentioned.

Judgment affirmed. All concur.

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F. W. MOORE, Appellant, v. KANSAS CITY, SPRINGFIELD & MEMPHIS RAILROAD COMPANY, Respondent.

Kansas City Court of Appeals, May 10, 1888.

CASE ADJUDGED—STATUTE OF FRAUDS.—The court upon consideration of the evidence in this case, wherein defendant is sought to be held for the debt of a third party, holds that if there was such agreement by defendant there was no sufficient consideration upon which to base it, and that the promise, if made, was not in writing; and that the case does not come within the principle of the cases which hold that when one undertakes to pay the debt of another, and by the same act pays his own debt, which was the motive of the promise, the undertaking is not within the statute of frauds and need not be in writing.

APPEAL from Dallas Circuit Court, HON. W. I. WALLACE, Judge.

Affirmed.

The case is stated in the opinion.

R. W. FYAN, for the appellant.

I. It was error to instruct the jury to find and return a verdict for defendant. The case was not within the statute of frauds. The defendant railroad company was indebted to Strang & Son at the time it promised to pay plaintiff (Moore), and in promising to pay Moore it extinguished a debt which it owed Strang & Son, and the promise made by the defendant to pay plaintiff was a direct undertaking of the debtor to pay his own debt and the case was not within the statute of frauds. *Hall v. Dollarhide*, 61 Mo. 433; *Flanagan v. Hutchison*, 47 Mo. 237; *Sinclair v. Bradley*, 52 Mo. 180. "This rule, however, seems to be well established and rests on solid ground, namely, that when one undertakes to pay

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the debt of another and by the same act also pays his own debt which was the motive of the promise, the undertaking is not within the statute and need not be in writing. In such a case the promise of the party is rather to pay his own debt than an undertaking to pay the debt of another." *Besshears v. Rowe*, 46 Mo. 503.

II. When the promise arises out of some new consideration of benefit or harm moving between the newly contracting parties, the case is not within the statute of frauds at all, and may rest in parol as in ordinary cases. *Farley v. Cleveland*, 4 Cowen [N. Y.] 435. "If the promise springs out of any new transaction or moves to the party promising upon some fresh and substantial ground of a personal concern to himself, it is not within the statute." Roberts on Frauds, 232.

III. When there are facts established from which the jury may reasonably draw legitimate inferences tending to sustain an issue, the court should not interfere, and if there is any evidence, however slight, tending to sustain the allegations of the petition, the court should not take the case from the jury. *Kelley v. Railroad*, 70 Mo. 604; *Moody v. Deutsch*, 35 Mo. 243; *Emmerson & Childs v. Sturgeon*, 18 Mo. 170; *Hay v. Bell*, 16 Mo. 496; *Smith v. Hutchison*, 83 Mo. 683.

C. B. McAFEE, for the respondent.

I. The alleged promise of George H. Nettleton (even if the testimony of plaintiff proves a promise at all) is the promise to pay the debt of another, not in writing, and is within the statute of frauds and the instruction was properly given for this reason. *Bissey v. Britton*, 59 Mo. 204; *Glenn v. Lehnen*, 54 Mo. 45; *Parker v. Scudder*, 56 Mo. 272; *Walther v. Merril*, 6 Mo. App. 36; *Green v. Estis*, 87 Mo. 337; *Petit v. Braken*, 55 Ind. 201; *Furbish v. Goodnow*, 98 Mass. 296; *Kruts v. Stewart*, 54 Ind. 178; *Braston v. Henderson*, 44 Md. 607; *Thomas v. Delphy*, 33 Md. 373; *Duffy v. Wunsch*, 42 N. Y. 243.

II. The allegations of the petition, denied by the

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answer, are that defendant was largely indebted to Strang and that Strang was indebted to plaintiff $1, 242.31, and that defendant promised to pay this sum to plaintiff out of what it owed Strang, and in pursuance of this promise did pay nine hundred dollars, but refused to pay the balance. There is no evidence whatever that defendant owed Strang at all, but on the contrary it was proven by plaintiff's own witness, Ford, and by Gen. Nettleton, president of the defendant, and not contradicted, that defendant did not owe Strang at all. It was proven by Ford, plaintiff's own witness, and by other testimony on part of plaintiff, that the nine hundred dollars was paid on the written contract of July 6, and not upon the pretended verbal agreement of July 12. There is no evidence to sustain the allegation of the petition and the instruction was properly given for this reason. *State to use v. Roberts*, 82 Mo. 388; *Charles v. Patch*, 87 Mo. 462, 463; *Nolan v. Shickle*, 3 Mo. App. 300.

III. The law always requires promises to pay other people's debts proven clearly and precisely even when not within the statute. This, at most, could only be an implied promise, and plaintiff's own evidence, when taken as strongly against him as required by the rule, does not show an implied promise. *Walther v. Merril*, 6 Mo. App. 38.

IV. On the twelfth of July when the pretended promise upon which plaintiff sues was made, Strang and the defendant had fully made and consummated their settlement and neither owed the other anything, and there is no pretense that any sum or other consideration passed to defendant to uphold the promise even if ever so solemnly and precisely made. Besides, the promise is claimed to have been made to the creditor Moore and not to the debtor Strang. See authorities cited above; *Walther v. Merril*, 6 Mo. App. 38.

V. The petition counts upon a novation, but there is a failure of proof. The allegation of indebtedness on part of defendant to Strang is disproved by himself on

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the trial. The promise pleaded is not proved as alleged. And no promise at all is proven as alleged. The petition is not based at all upon the alleged promise of July 12. And there is no evidence to sustain the allegation of the petition, and the instruction was properly given for this reason. See authorities cited. The appellant has cited, *Hall v. Dollarhide*, 61 Mo. 433; *Flannagan v. Hutchinson*, 47 Mo. 237; *Sinclair v. Bradley*, 52 Mo. 180; *Bershears v. Rowe*, 46 Mo. 593; *Farley v. Cleveland*, 4 Cowen, 435. These five cases are all of the same character, and are decided upon precisely the same principle, and the doctrine of these cases is not controverted by the respondent. The promise in each and all of them was not to pay the debt of another, but were original promises to pay the promisor's own debt, and based upon a consideration, and therefore not within the statute. But they are not in point here. Because defendant, on the twelfth day of July, 1882, owed Strang nothing, and the pretended promise to pay the balance of Strang's debt, to Moore, to-wit, $342.31, is a promise (if a promise at all) to pay Strang's debt, is not in writing, and is based upon no consideration whatever.

ELLISON, J.—Plaintiff, a merchant, furnished supplies to one Strang, a contractor who was constructing a portion of defendant's roadbed in Wright and Webster counties. Defendant's contract with Strang provided for its rescission upon certain contingencies. The contract was rescinded on July 6, 1882, by a written agreement in which, as a part of the consideration thereof, defendant assumed the payment of certain debts owing by Strang, among them the sum of nine hundred dollars, due to plaintiff from Strang. There was a provision in this agreement in these words: "It is not pretended that the above bills are exact in amounts. But it is understood that payments will not be made in excess of the sums stated." It seems that Strang owed plaintiff $342.31 more than was assumed in this agreement, and it is for this latter sum, that plaintiff institutes this

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action against defendant. An instruction in the nature of a demurrer to the evidence was sustained, and plaintiff appeals.

It will be observed that defendant is being sued for the debt of Strang, and the question is, has plaintiff shown by the evidence that such debt has become that of defendant?

We will not enter into a detailed statement of the evidence, but rest content by stating that an examination thereof, as it has been preserved, satisfies us that the court's action on the instruction was correct. The written agreement between defendant and Strang provided for Strang surrendering his contract of construction, delivering up the roadbed, and releasing defendant from all liability thereunder, the consideration being the sums of money already paid Strang, *and* the assumption by defendant of certain specified debts owing by Strang, among the number nine hundred dollars, owing to plaintiff. This nine hundred dollars was paid to plaintiff as agreed, and if we should go so far as to say there was evidence to support a further agreement on defendant's part made afterwards, to pay Strang's debt, we can find no sufficient consideration upon which to base it. Again, if the promise to pay plaintiff be conceded, it was but the promise to pay the debt of another and should have been in writing. But plaintiff seeks to avoid this trouble by the assertion, that when one undertakes to pay the debt of another and by the same act also pays his own debt, which was the motive of the promise, the undertaking is not within the statute and need not be in writing, such case being rather a party's promise to pay his own debt, than an undertaking to pay the debt of another. This is a correct statement of the law, but to be applicable to this case, it should be shown that defendant was indebted to Strang, which has not been done.

Our opinion is, the judgment should be affirmed, and it is so ordered.

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31	150
43	313
31	150
47	55
31	150
51	541
51	650
31	150
56	378
31	150
66	624

CHARLES C. BASSETT, Respondent, v. JOHN M. GLOVER, Administrator, *et al.*, Appellants.

St. Louis Court of Appeals, May 22, 1888.

1. EVIDENCE—MISDESCRIPTION AND IDENTIFICATION.—When a written contract refers by a false description to another instrument bearing a collateral or descriptive relation to some of its terms, parol testimony may be introduced to identify the instrument intended, and to establish the fact of a misdescription in the contract.

2. PER ROMBAUER, P. J., CONCURRING IN THE RESULT:—When, upon a view of the whole record, it is clearly manifest that the judgment is for the right party, it will not be reversed, although errors may have intervened.

APPEAL from the St. Louis Circuit Court, HON. GEORGE W. LUBKE, Judge.

Affirmed.

KLEIN & FISSE, for the appellants: The case was tried upon the theory, expressly announced by plaintiff's counsel, that no relief was asked or to be granted except relief at law. In such a case, the court has no authority to render a judgment upon any other contract than the one set out in the petition as the foundation of the action. Leake on Contracts [Ed. 1878] 314, 318; 2 Parsons on Contracts [7 Ed.] *495, 497; *Rayburn v. Dever*, 8 Mo. 104; *Leitsendorfer v. Delphy*, 15 Mo. 160; *McClurg v. Phillips*, 49 Mo. 315, 317; Leake on Contracts [Ed. 1878] 318, 321; Parsons on Contracts [7 Ed.] *496. The case does not fall within the rule that where there is an error or mistake on the face of the instrument so obvious as to leave no doubt of the intention of the parties, the mistake will be disregarded without sending the party into equity to have the instrument reformed. That rule is applied only in cases "where the mistake in the expression of a written contract is obvious on the face of the instrument, so as to leave no

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doubt of the intention of the parties without the aid of extrinsic evidence to explain it." Leake on Contracts [Ed. 1878] 327; 2 Parsons on Contracts [7 Ed.] *496, and note; *Gaines v. Allen*, 58 Mo. 537, 543; Wald's Pollock on Contracts, s. p. 452; *Michel v. Tinsley*, 69 Mo. 442, 448. The character of the case at bar is disclosed by the petition, from which it plainly appears that extrinsic evidence was necessary to discover that a mistake existed in the contract sued on. In such a case, we submit that the contract must stand as it is written until reformed in equity. 2 Parsons on Contracts [7 Ed.] *496, 497. While it is true that the distinction between legal and equitable forms of action has been abolished by the code, yet the distinction and salient characteristics of the two systems, law and equity, still remain as well pronounced as before; and in all cases where equitable relief is necessary, a court trying a case at law cannot afford such relief. *Holden v. Vaughan*, 64 Mo. 588; Pomeroy's Rem. and Rem. Rights [2 Ed.] sec. 69; Bliss on Code Plead. [2 Ed.] sec. 116 and note, and sec. 170 and note. When the plaintiff announced that the case was to be tried strictly as an action at law, and not in equity, the evidence offered by the plaintiff should have been excluded, under the fundamental principle that parol testimony is inadmissible to contradict, add to, subtract from, or vary the terms of a written instrument. *Bunce v. Beck*, 43 Mo. 266, 279; *Murdock v. Ganahl*, 47 Mo. 135, 136; *Burress v. Blair*, 61 Mo. 133, 140; *Koehring v. Muemminghoff*, 61 Mo. 403, 407; *County v. Wood*, 84 Mo. 489, 515; *Fruin v. Railroad*, 89 Mo. 397, 404

R. O. BOGGESS, for the respondent: The language employed in the agreement was meant and intended to express the considerations and obligations of the contract, and also to describe the subject-matter of the contract. It is necessary in all such cases where a dispute arises as to the subject of such contract, where the descriptive language is not adequate and sufficient, or is in any sense indefinite and uncertain, to ascertain

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by and from their concomitant facts and circumstances, what was the subject-matter of the contract. In order to do so the court will, as a rule (and there is scarcely an exception to the rule), if possible, place itself at the same standpoint of the parties to the contract at the time and place when and where it was made, and will then construe the contract with reference to the objects and purposes of the parties thereto; and if, in looking at the contract which the parties did in point of fact make and sign, the court shall find that they have omitted some necessary words of description, and added some false words of description, it will uniformly supply the omitted words, and reject the surplus words, so as to get at and accomplish the actual ends and purposes of the contracting parties. *Edwards v. Smith*, 63 Mo. 119; *Fontaine v. Savings Inst.*, 57 Mo. 552; *Holocher v. Holocher*, 62 Mo. 267; *Miller v. McCoy*, 50 Mo. 214; *McConnell v. Brayner*, 63 Mo. 461; *King v. Fink*, 52 Mo. 209; *Amonett v. Montague*, 63 Mo. 201; *Filibert v. Berch*, 4 Mo. App. 470; *Langlois v. Crawford*, 59 Mo. 456; *Schreiber v. Osten*, 50 Mo. 513; *Aull v. Lee*, 61 Mo. 160; *Elliott v. Secor*, 60 Mo. 163; *McPike v. Allman*, 53 Mo. 551.

THOMPSON, J., delivered the opinion of the court.

This action is brought on a contract against the personal representatives of Samuel T. Glover and John R. Shepley, who were partners in the practice of the law under the firm name of Glover & Shepley. The case was tried in the circuit court without a jury, resulting in a judgment for the plaintiff, from which the defendants prosecute this appeal.

The evidence adduced at the trial does not, so far as we can see, present any controversy, or even discrepancy, as to a single fact. Upon the facts, the judgment which was rendered declares merely the conclusion of the law. This judgment must stand, unless we are obliged to reverse it because of a supposed technical error of procedure, which, so far as we can see, has not

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in any degree affected the conclusion of the court upon the merits, or prejudiced the defendants.

The case, as made by the pleadings and the evidence, stated in a small compass, was this: The plaintiff had a contract with Mt. Pleasant township, in Bates county in this state, to defend certain actions which had been brought against Bates county, in the circuit court of the United States, upon certain railway aid bonds which had been issued by Mt. Pleasant township. Under the contract, he was to get, in case of successfully defending the action, a contingent fee of ten per centum upon the bonds, and in case of not successfully defending them he was to get nothing. This contingent fee, in the event of his success, would amount to some seven thousand dollars. He afterwards procured the township to pay this contingent fee to him upon his giving a bond, with security, to refund it to the township in the event of being finally unsuccessful in the defence of the suits. To assist him in defending the suits, he made a contract with Glover & Shepley, by which they were to aid him with their legal services in such defence, for a fee of two thousand dollars, contingent, in like manner as his fee, upon the event of finally succeeding in defending the suits. This fee of two thousand dollars he was to advance to them, and, in the event of the defence of the suits being unsuccessful, they were to refund it to him. He advanced it to them, in the form of his promissory note, secured by a deed of trust, which note he afterwards paid. He was not successful in the defence of the suits, and, therefore, in the year 1886, he repaid to the township, in its debentures, the seven thousand dollars, which it had advanced to him. He now brings this action to enforce the undertaking in the contract had between himself and Glover & Shepley, by which they agreed to refund to him the two thousand dollars, advanced to them in case the defence of the suits was not successful. This undertaking was expressed in a separate writing signed by Glover & Shepley, in the following words:

"Whereas C. C. Bassett, of Bates county, Missouri,

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has this day given us his note, for the sum of two thousand dollars, with approved security, payable March 1, 1879, which was in payment of our fee in the cases prosecuted, or hereafter to be prosecuted, against Bates county, Missouri, upon the Mt. Pleasant township railroad bonds; and whereas said fee in said case was contingent and dependent upon the success of said county in said suits, and said fee has been paid to said Bassett, upon his executing a bond to said county, conditioned that if said actions should be decided adversely to said county, then the said fee should be refunded. Now, therefore, we hereby agree to assist said Bassett in the defence of any actions which may be brought on said Mt. Pleasant township bonds, and in case said Bassett shall be compelled to refund to said Bates county, any part of said fee, we agree to pay him back so much of said fee so refunded as the amount of the note received bears proportion to seven thousand dollars.

"(Signed) GLOVER & SHEPLEY.

"St. Louis, June 6, 1878."

This statement of facts is established by an undoubted and uncontroverted chain of evidence, and it shows that the plaintiff is entitled to recover.

The question raised by the defendants on this appeal arises in this way: In the above contract between the plaintiff and Glover & Shepley, which is the subject-matter of the suit, there is a misrecital of the bond given by the plaintiff to Mt. Pleasant township, in that it is recited as a bond given by him to Bates county. It is easy to understand how the misrecital arose. Actions upon township bonds were, under the law existing at that time, prosecuted against the county of which the township formed a part, and these actions were so prosecuted. In his petition, the plaintiff sets out this mistake and alleges that the contract between him and Glover & Shepley, wherein it referred to Bates county, was intended to refer to Mt. Pleasant township, that is, to the bond which he had given to Mt. Pleasant township to refund, in the event of not being successful in

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the defence of the suits, the fee which the township had advanced to him. The answers of the defendants, so far as they touch the merits of the controversy, were general denials.

When the cause was called for trial, the defendants objected to the introduction of any evidence on behalf of the plaintiff, for the reasons that in the petition two causes of action, one legal and the other equitable, were improperly united in one count; and because the plaintiff was not entitled to equitable relief upon the facts stated in the petition, nor was the plaintiff entitled to relief at law until the contract set out in the petition was corrected. According to the recitals of the bill of exceptions "the plaintiff then stated that this action was to be treated only as an action at law and was to be so tried; whereupon the court overruled the defendants' objections, and permitted testimony to be introduced by the plaintiff, to which ruling of the court the defendants then and there excepted at the time." Thereupon the plaintiff went forward with his evidence, in the course of which he proved by the testimony of witnesses that his contract with Mt. Pleasant township was the only existing contract to which the contract sued on could have referred. He proved that there was no other such contract made or such bond taken than those had with him and his then associate, Henry, and Mt. Pleasant township, and that no such contract or transaction as that described in the contract sued on had ever been had or made with Bates county. This evidence was admitted over the objections of the defendants, and the admission of it presents the only question which arises on this appeal.

There is, perhaps, no rule of law which is more flexible or subject to a greater number of exceptions than the rule which, in actions at law, excludes parol evidence offered to vary or explain written contracts. In one case, where we had great difficulty in dealing with this question, it was said: "It may be a fair general

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conclusion that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case." *Liebke v. Methudy*, 14 Mo. App. 70. The strict rule unquestionably is, that the obligee in a written contract which contains a mistake materially affecting the rights of the parties, must, in order to recover upon it, bring his action in equity, seeking to reform the contract on the ground of mutual mistake, and then to recover upon it as thus reformed. But this rule is by no means universal. It was held by this court that parol evidence is competent to show that a written assignment of a judgment on the margin thereof was for convenience of collection, and not a transfer of the beneficial interest therein; and that relief will be granted according to the allegations of the petition and the proof thereunder, irrespective of the form of the action,—that is, irrespective of the question whether it is in fact an action at law or a suit in equity. *Wittenauer v. Watson*, 11 Mo. App. 588. In an action at law to recover the balance due on a promissory note alleged to have been assigned by the plaintiff to the defendant as collateral security for an advance of money, it was held that the trial court did not err in admitting parol evidence, submitted by the plaintiff, tending to show that the assignment, though unconditional upon its face, was intended as collateral security merely. *Wood v. Matthews*, 73 Mo. 477, 481. In the recent case of *Quick v. Turner*, 26 Mo. App. 29, 36, we followed the same rule in an action at law upon a promissory note, holding it competent to show that a written assignment of a note, absolute on its face, was intended as a mere pledge of security. These cases, whether well or ill decided, go farther than the circuit court went in this case, and show to what extent, under our system of procedure, in which legal and equitable remedies are blended, our courts have gone in disregarding the form of the action, where it could be done without affecting the substantial merits of the case.

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There would be no difficulty in this case if the plaintiff, after the objection of the defendant to the form of his petition, as above pointed out, had not proposed to try the case as an action at law. But in what respect would it have been tried differently if he had proposed to try it as a suit in equity? It would have been tried by the judge without a jury, as here. The judge would have, under the pleadings, admitted the evidence showing the true meaning of the contract, which he admitted here. His decree would have been, equally with his judgment in this case, the mere conclusion of the law upon a state of undisputed facts, though somewhat different in form. If, then, this objection is to prevail, for what purpose should we reverse this judgment? In order that it may be remanded to the circuit court, and that the counsel for the plaintiff, better advised in the premises, may announce that he proposes to try it as a suit in equity, after which announcement the precise process will be gone through with, except the giving of instructions, as has been gone through with upon this trial?

We are forbidden by the statute (Rev. Stat., sec. 3775) to reverse the judgment of any court unless we shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action.

Outside of these considerations, it may be doubted whether the misdescription in this contract was of a matter so substantial as to require it to be reformed in a suit in equity before recovering upon it. It was merely a misdescription of another and inducing or collateral contract had between one of the parties to this contract and another party. This is merely a case where there has been a misdescription in a contract of the *identity* of another existing thing. If A sells to B a thousand bushels of corn, by a contract in writing, A cannot, of course, prove, in an action on the contract, that instead of corn the parties meant oats, and that he tendered a thousand bushels of oats in a fulfilment of the contract.

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So, if A conveys to B, Blackacre, he cannot bring an ejectment against B and recover by proving that instead of Blackacre, the parties meant Whiteacre, and that B had taken possession of the wrong tract. But suppose that A owns but one tract of land in the world and that is called Blackacre, and he conveys it to B by the name of Whiteacre, must B, in order to recover possession of it, first go into equity to reform the misdescription in the deed? Modern precedents show that American courts are constantly in the habit, where the deed or other written contract identifies land or some other existent thing, and the question in issue is as to what was embraced in the identifying words—of admitting parol evidence to show what the parties intended, although in many cases to do so will vary the strict language of the instrument. Thus, it is a familiar rule of law that the identification or location of the land described in a deed of conveyance is always a question of fact for the jury, to be decided upon the calls of the deed, aided and explained, when necessary, by parol evidence. *St. Louis v. Meyer*, 13 Mo. App. 367, 382; s. c., affirmed, 87 Mo. 276; *Barry v. Otto*, 56 Mo. 177; *Abbott v. Abbott*, 51 Me. 575, 581; *Waterman v. Johnson*, 13 Pick. 261. This rule has been extended so far as to let in parol evidence to explain a public patent so far as to show that a particular monument, not called for in the instrument by name, was intended to be adopted by it. *Cherry v. Slade*, 3 Murph. [N. C.] 82; see also, *Safret v. Hartman*, 5 Jones' L. [N. C.] 185. In an action for damages for the breach of a contract to convey land, where it is objected that the instrument sued on does not describe the land, the question of the sufficiency of the description is for the jury, unless it is manifest from the instrument that it cannot be located. *White v. Hermann*, 51 Ill. 243. "It cannot be denied," say the court of appeals of Maryland, "that the jury are the proper tribunal to decide whether any and what variation ought to be allowed in the location of lands. But whether any and what degree of allowance for

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variation ought to be made, are questions of fact, to be determined by the jury on the testimony on that subject, adduced to them in the trial of the cause." *Wilson v. Inloes*, 6 Gill [Md.] 121, 163; *Peterkin v. Inloes*, 4 Md. 175. In such cases as has been well said: "It sometimes happens that the monument found upon the ground corresponds with the description of the monument in the deed in some particulars, and differs from it in others. In such cases the whole description in the deed is not to be rejected, and parol evidence is admissible to show whether the monument, partially but erroneously described, was the one intended." *Abbott v. Abbott*, 51 Me. 575, 581, per DAVIS, J.; see also, *Parker v. Smith*, 17 Mass. 413; *Clark v. Munyan*, 22 Pick. [Mass.] 410; *Slater v. Rawson*, 1 Metc. [Mass.] 450.

Not only in the location of the land described in deeds of conveyance, but in all other cases, identity is peculiarly a question of fact for a jury. *Begg v. Begg*, 56 Wis. 534, 537; *McDuffie v. Clark*, 39 Hun [N. Y.] 166; *State v. Babb*, 76 Mo. 504; *Miller v. McCullough*, 104 Pa. St. 629; *Miller v. Marks*, 20 Mo. App. 369; *Scott v. Sheakly*, 3 Watts [Pa.] 50; *Prentiss v. Blake*, 34 Vt. 460; *Tutt v. Price*, 7 Mo. App. 194; *Tilford v. Ramsey*, 37 Mo. 563, 567.

As shown by some of the foregoing decisions, cases where there is in the deed or other written instrument a *partial misdescription* of the thing intended to be identified, are appropriate cases for the application of this rule, which submits the question of identity to the decision of the jury in an action at law. The case before us seems to be a case within this principle. The contract sued on recites that the plaintiff has given to Glover & Shepley a promissory note with approved security for the sum of two thousand dollars, in payment of their fee in the cases prosecuted or thereafter to be prosecuted against Bates county, Missouri, upon the Mt. Pleasant township railroad bonds. It also recites that the fee was contingent upon the success of the county in said suits. So far its recitals are correct. The suits

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were against the county as shown by this record. It also recites that said fee, meaning the fee of the plaintiff, was contingent and dependent upon the success of said county in said suits, and that said fee has been paid to said Bassett upon his executing a bond. So far its recitals are in like manner correct. Then comes the departure from the fact, by the misrecital that the bond was given to the county, whereas in fact the testimony shows that no such bond was given to the county, but that the bond which was given (put in evidence in this record) was to the township. It then recites the condition upon which Glover & Shepley agreed to refund a portion of the fee, as follows: "Now, therefore, we hereby agree to assist said Bassett in the defence of any actions which may be brought on said Mount Pleasant township bonds, and in case said Bassett shall be compelled to refund to said Bates county any part of said fee, we agree to pay him back so much of said fee so refunded as the amount of the note received bears proportion to seven thousand dollars." Here there was a misrecital in so far as the contract spoke of Bassett being compelled to refund to Bates county. His bond was not given to Bates county but to Mt. Pleasant township, and in fact he refunded to Mt. Pleasant township. It seems to have been nothing more than a partial misdescription of an existing thing. If a deed should describe a monument upon a certain hill as a granite boulder, and it should turn out to be a boulder of porphyry, it would be absurd to say that it would be necessary to go into equity to reform the deed, or that a jury could not say upon extrinsic evidence whether or not the boulder of porphyry was the monument intended by the deed.

ROMBAUER, P. J., concurring in the result, the judgment is affirmed.

ROMBAUER, P. J., delivered a concurring opinion.

I concur in the result of the opinion, but do not concur in the views therein expressed touching the

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admissibility of oral evidence in an action at law upon the contract, varying its terms and conditions. For that reason I prefer to place my concurrence solely upon the ground hereinafter stated.

The Supreme Court has repeatedly decided that, where it is manifest that if the judgment were reversed the result upon a new trial would be the same as upon the first trial, the judgment will not be reversed, even though the case has been tried upon an improper theory. *Conley v. Doyle*, 50 Mo. 234, 235. Or even though the court proceeded erroneously and irregularly. *Mississippi Bridge Co. v. Ring*, 58 Mo. 491, 495. The reports are full of cases where judgments were affirmed on appeal as being manifestly for the right party, notwithstanding intervening errors. *Hedecker v. Ganzhorn*, 50 Mo. 154; *Jackson v. Magruder*, 51 Mo. 55; *Mo. Glass Co. v. Sewing Machine Co.*, 88 Mo. 57; *Ghio v. Beard*, 11 Mo. App. 21; *Brown v. Railroad*, 20 Mo. App. 427; *Fell v. Coal Co.*, 23 Mo. App. 216.

I am free to concede that the exercise of this power should be used with great caution by appellate courts, but this is a case which eminently calls for its exercise. There is not even an intimation found in the entire record that the plaintiff was not entitled to a reformation of the contract in equity, provided he had proceeded to obtain such reformation, or that he was not entitled to a judgment at law upon the contract thus reformed, or that the damages are excessive. The testimony contained in the record conclusively points to the fact that the plaintiff was entitled to the identical ultimate relief which he obtained, and that the court would have been justified, under the provisions of section 3567, to cause an amendment of the pleadings, if necessary.

Under these circumstances, I do not feel warranted to reverse the judgment, even conceding that the mode of procedure by which the result was reached was irregular or erroneous.

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PIETY E. BATES *et al.*, Appellants, v. HIRAM N. HOLLADAY, Respondent.

St. Louis Court of Appeals, May 22, 1888.

1. EVIDENCE—HUSBAND'S AUTHORITY AS WIFE'S AGENT.—Where it appears that a husband was general agent for his wife in all matters pertaining to a particular business, any special limitation upon his authority which is unknown to a party dealing with him in such business, cannot be shown in evidence so as to affect the rights of such party.

2. EVIDENCE—DECLARATIONS OF AGENT.—While loose declarations of an agent, made to the whole country around, should not be detailed in evidence to affect the rights and liabilities of his principal, yet the admission of such declarations will not be deemed prejudicial, when it appears that they referred to matters within the scope of his agency, and that their effect is confirmed by other evidence in the cause.

3. EVIDENCE—TAMPERING WITH WITNESS.—Evidence tending to show that the adverse party has attempted to tamper with a witness is admissible for the purpose of impeaching the testimony given by such adverse party, but for no other purpose. But it is necessary first to lay a foundation for such evidence by asking the party whether he has made such an attempt. The admission of the evidence without this foundation is error.

APPEAL from the Butler Circuit Court, HON. JOHN G. WEAR, Judge.

Reversed and remanded.

WILLIAM N. NALLE, for the appellants: The allegation in the answer, that Geo. Bates, co-plaintiff, as agent, on or about the ——— day of August, 1884, abrogated said contract, does not present an issue upon that subject, it not appearing that he had any power or authority to do so; nor before a breach by defendant of the contract; nor did defendant act promptly upon

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it. *Edwards v. Weeks*, Fourche's Sel. Cas. 699 ; *Melton v. Smith*, 65 Mo. 315. George Bates' declarations, if true, in the absence of P. E. Bates, for whom he acted as special agent only, were not competent to modify, alter, or rescind the contract, unless it had been shown that he had authority to make such declarations. It will not be presumed that he had such authority from his acts in general in that employment or business. *Dickerson Co. v. Ins. Co.*, 41 Ia. 474 ; Ewell's Evans on Agency (Ed. 1879), 2, 3, note ; *Ayers v. Milroy*, 53 Mo. 516 ; *Chouteau v. Filley*, 50 Mo. 174 ; *Barrett v. Railroad*, 9 Mo. App. 226 ; *Wheeler v. Givan*, 65 Mo. 89 ; *Allee v. Fink*, 75 Mo. 100. Plaintiff was a married woman ; her husband was the agent to manage her business under the contract ; a written authority to rescind, etc., was necessary under our statutes. Sess. Acts, 1883, p. 113 ; *Eystra v. Capelle*, 61 Mo. 578 ; *Alexander v. Rollins*, 14 Mo. App. 109 ; *McGinnis v. Mitchell*, 21 Mo. App. 493. The court having permitted the jury to hear these declarations, it was competent for plaintiff to show that her agent had no authority to rescind or alter her contract with defendant by such a declaration, or any other. *State v. Cooper*, 83 Mo. 698. The testimony of Hettie Anderson that related to George Bates' talk to her was in no sense competent. If George had attempted to suborn her in fact, it was a matter for the grand jury to investigate and not for a petit jury trying issues in which he had no interest. Why the jury returned a verdict for the defendant and assessed his damages at one hundred and twenty dollars, can only be explained upon the hypothesis that it was the result of prejudice, or passion. The defendant did not ask it. The court did not direct them to assess any damages to him ; the profits did not warrant it. The most defendant could have recovered, even though plaintiff's whole claim should have been ignored, was seventy-eight dollars, and that only upon the theory that the contract was never abrogated. The verdict must accord with the instructions. *Rafferty v. Railroad*, 15 Mo. App. 559.

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SETTLE & BUGG and S. M. CHAPMAN, for the respondent: The objection urged to the cross-examination of the plaintiff Bates is not well taken. In his examination in chief, he testified that he was the husband of his co-plaintiff; that he bought the saw-mill at Keener, Missouri, for her, and that he was her agent to "attend to all of the business" of the company (himself and wife) "connected with the saw-mill." It was, therefore, clearly competent, upon cross-examination, to interrogate him as to the entire case, and show the relation and connection he sustained to the business. *Page v. Kankey*, 6 Mo. 433; *Brown v. Burrus*, 8 Mo. 26, 30; *Railroad v. Silver*, 56 Mo. 265; *State v. Brady*, 87 Mo. Mo. 142, 145; 1 Greenl. on Evid., sec. 445. Having testified in chief, on behalf of himself and co-plaintiff, he does not become the witness of the opposite party by being cross-examined. 1 Greenl. on Evid., secs. 446, 447; *Railroad v. Silver*, 56 Mo. 265; *State v. Douglass*, 15 Mo. App. 1; *Drew v. Arnold*, 85 Mo. 128; *Beal v. Nichols*, 2 Gray (Mass.) 262, 264; *Moody v. Rowell*, 17 Pick. 490, 498; *Jackson v. Varick*, 7 Cow. (N. Y.) 238. The entire evidence establishes that if the plaintiff George Bates was not the absolute owner of the mill and the business connected with it, that he managed, conducted, and controlled all the business connected with the mill, after his purchase; that his co-plaintiff, Piety E. Bates, had no connection with its management, but intrusted the entire matter to her co-plaintiff, thus constituting him, in the broadest sense, her general agent, and was, therefore, bound by his acts. 2 Kent Com. [11 Ed.] s. p. 620; 1 Greenl. on Evid., sec. 113; 2 Wharton on Evid., sec. 1173; *McGinness v. Mitchell*, 21 Mo. App. 493; *Brooks v. Jameson*, 55 Mo. 505, 512; *White v. Railroad*, 19 Mo. App. 400; *Hull v. Jones*, 69 Mo. 587. The authority of an agent will be measured and determined by the nature of the business, interests, and dealings of his principal, and will be held to be co-extensive with the requirements of the business with

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which he is entrusted. *Gentry v. Ins. Co.*, 15 Mo. App. 215; *Summerville v. Railroad*, 62 Mo. 391; *Franklin v. Ins. Co.*, 52 Mo. 461; *Edwards v. Thomas*, 66 Mo. 468. The fact of agency is proven and admitted by the plaintiffs; and the jury has found that the acts and doings of the plaintiff, George Bates, was within the scope of his authority as agent, and binding upon his co-plaintiff. *McGinness v. Mitchell, supra; Barrett v. Railroad*, 9 Mo. App. 227. The extent of the agent's authority is a question of fact to be settled by the jury, and where there is any substantial evidence to sustain the finding, the verdict and judgment of the trial court will not be disturbed. *Thompson v. Russell*, 30 Mo. 498; *Bank v. York*, 89 Mo. 369; *Huckshorn v. Hartwig*, 81 Mo. 648; *Papin v. Allen*, 33 Mo. 260; *Memphis v. Matthews*, 28 Mo. 248. A written contract may be changed by a subsequent oral agreement (*Monahan v. Finn*, 13 Mo. App. 585), and, "whether they have done so is a question for the jury." *Vastine v. Wyman*, 5 Mo. App. 598; *Fine v. Rogers*, 15 Mo. 315, 321; *Day v. Ins. Co.*, 88 Mo. 331; *Bunce v. Beck*, 43 Mo. 266; *Henning v. Ins. Co.*, 47 Mo. 425; 1 Greenl. on Evid., secs. 303, 304; *Kennebeck Co. v. Ins. Co.*, 6 Gray, 204, 214. Where a party sues upon a contract, he must, as a prerequisite to a right of recovery, establish performance on his part, or a valid reason for his failure to do so. *Downey v. Burke*, 23 Mo. 228; *Davis v. Smith*, 15 Mo. 467; *Dermott v. Jones*, 2 Wall. 1, 7.

THOMPSON, J., delivered the opinion of the court.

This is an action brought by a married woman, with whom her husband is joined, to recover liquidated damages for the breach of a contract. The answer, after a general denial, admitted the contract, setting it out in detail. It then pleaded various breaches of it. It also pleaded a subsequent parol modification of it, and a breach of the supplementary parol agreement; and claimed damages for these breaches by way of counterclaim. A trial was had before a jury, who returned the

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following verdict: "We, the jury, find the issues for the defendant and assess his damages at the sum of one hundred and twenty-five dollars and costs." Upon this verdict a judgment was rendered in favor of the defendant for one hundred and twenty-five dollars and costs, and the plaintiffs have appealed.

Many errors are assigned by appellants touching the admission and rejection of evidence, and the giving and refusing of instructions. Most of them are so clearly untenable as not to require special observation.

I. Though not assigned for error or made the ground of a motion in arrest of judgment, it is perhaps the proper subject of observation that the verdict is irregular in that it does not dispose of all the issues. It should have found for the defendant upon the issue joined upon the petition and also for the defendant upon his counter-claim, and should have assessed the damages upon the counter-claim. We mention this irregularity in view of the possibility of another trial, adding that, as it was not called to the attention of the trial court by the proper motion, or even assigned for error here, we do not make it the ground of reversing the judgment.

II. The contract which is the subject of the action related to the sale of lumber by the female plaintiff to the defendant, which lumber was made at a mill owned and operated by her through the agency of her husband. The evidence of her husband was to the effect that as her agent he attended to all her business connected with the mill. As such, he made the arrangement with the defendant and other parties, by which she became the successor of such other parties in the contract which is the subject of the suit. It was set up in the answer and shown in the defendant's evidence, that the contract sued on had been verbally rescinded or abandoned by the husband of the beneficial plaintiff before the breach of it for which the action is brought. In anticipation of this defence the counsel for the plaintiff asked the

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plaintiff's husband whether he had any authority or power from his wife, the co-plaintiff, to modify or rescind the contract with the defendant, and if so, what was it. This evidence was objected to by the defendant, and the objection was sustained. As no offer was made to show that the defendant had knowledge of any limitations upon the authority or power under which the plaintiff George Bates was acting for his wife, and as his own evidence, given for her, showed that he was her general agent in and about the whole business to which the contract related, we do not see that error was committed in sustaining the objection. If he was, as his testimony shows, her general agent in the charge and management of the whole business, and if, as such, he took for her the contract which is the subject-matter of the suit, any limitation imposed by her upon him in respect of the particular contract, unknown to the defendant, could not be shown in evidence for the purpose of affecting his rights. *McGinnes v. Mitchell*, 21 Mo. App. 493.

III. As a general rule the declarations of an agent are not admissible in evidence to bind his principal, except when he is acting about the subject-matter of the agency; and in an ordinary case of agency it is scarcely necessary to say that the loose declarations of the agent, made to the whole country around, should not be detailed in a court of justice to charge his principal with liability or obstruct him in the recovery of his rightful demands. Such declarations of the plaintiff George Bates were detailed in this case by several witnesses. But as he seems to have had absolute control of the whole business of running this sawmill, and as his wife, so far as appears, never took the slightest part in it—it would seem to follow that if he had the power to terminate this contract, as the evidence tends to show, his declarations of his intent to terminate it and of his purpose of violating it were competent in connection with the other evidence. A careful reading of all the testimony convinces us that no prejudicial error was committed in this regard.

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IV. Except possibly as to the *quantum* of damages awarded the defendant, the verdict was supported by a very great preponderance of evidence. It may be doubted whether the evidence, as preserved in this record, affords a distinct ground for awarding to defendant more than seventy-eight dollars damages. At the same time, upon the question whether the plaintiffs had not violated the contract in important and essential particulars prior to the time when the defendant refused further to be bound by it, the evidence greatly preponderates in favor of the defendant; so much so that it can scarcely be doubted that another trial upon the same evidence will lead to the same result. We, therefore, regret to find an element in the case which obliges us to reverse the judgment and remand the cause.

Mrs. Anderson was called as a witness for the defendant, and, after having testified at considerable length concerning declarations of the plaintiff George Bates, made, according to the bill of exceptions, the following statements: "On the seventh day of May A. D. 1887 [this was probably on the previous day, or the previous day but one, as the judgment was rendered on the ninth day of May, 1887], while this court was in session Mr. Grounds [an employe of the plaintiffs] came to me in the courthouse at Poplar Bluffs, Missouri, and said to me, that Mr. Bates wanted to see me. I went down stairs and into the store under the courtroom and said to Mr. Bates: 'Mr. Grounds told me you wanted to see me.' He asked me what I knew about this case. I said I did not know much about it. He then said, 'Old girl, don't be too hard on me'; and gave Mr. Hartwell a dollar and told him to go and buy my babies a dress. Mr. Hartwell put the money in his pocket and went out. Mr. Bates then bought them a dress and the dress to me. [There is a clerical omission in the preceding sentence, which should probably be supplied by the word "gave" or "handed".] On the same evening, after court had adjourned, I was standing on the corner of the street, and Mr. Bates came to me, and I said to him, 'I am

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going home and stay there, and if they get me back they will have to take me with a state's warrant.' Mr. Bates said, 'Stick to that, and if they fine you I will pay it.'" The bill of exceptions then recites: "To all the foregoing evidence plaintiff objected at the time it was sought and before it went to the jury, on the ground of incompetency, irrelevancy, and only effective to prejudice the jury against the plaintiff—specially objected to at the time, and upon the grounds stated. The court overruled the objection, and the plaintiff excepted at the time." It is but just to the plaintiff George Bates, to say that this evidence was rebutted by his own testimony and that of Hartwell, who, according to Mrs. Anderson's testimony, was present. Nevertheless, we think that it was incompetent, and if so it is obvious that it must have been prejudicial.

A witness in this state may be impeached by evidence of general bad character in the community in which he resides; and an attempt (though not successful) was made in this case so to impeach the testimony of this witness. A witness may also be impeached in this state by evidence of his having attempted to suborn or tamper with witnesses subpœnaed in the particular case. *State v. Downs*, 91 Mo. 19; see also, *Oberfelder v. Kavanaugh*, 32 N. W. Rep. (Neb.) 296. This testimony was admissible for the purpose of impeaching the testimony of George Bates as a witness, and for no other purpose. This question was distinctly ruled in *The Queen's case*, 2 Brod. & Bing. 312. But to render it admissible against him for that purpose, it was first necessary to lay the proper foundation by asking him on his cross-examination whether he had not made such an attempt; since if such a charge is brought against him it is due to him that he be notified and have an opportunity to explain. This precise point was also adjudged in *The Queen's case*, *supra*, by the judges in answer to a question propounded by the Lords. This evidence should have been excluded in the form in which it was

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presented, and the subject, if thought of sufficient probability when brought to the attention of the judge, should have been reserved for a separate investigation.

ROMBAUER, P. J., concurring, the judgment is reversed and the cause remanded; PEERS, J., not sitting.

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WALKER G. MERIWETHER, Plaintiff in Error, v. H. V. P. BLOCK, Executor, etc., Defendant in Error.

St. Louis Court of Appeals, May 22, 1888.

RES JUDICATA—REMOVAL OF EXECUTOR.—An application for the removal of an executor, under Revised Statutes, section forty-three, is a proceeding *in rem*, and the matters therein determined, including the existence of a sufficient cause for the executor's removal, are *res judicata* as to all the world; so as to bar inquiry into them in a subsequent proceeding instituted for the same purpose, even by a different complainant. But where the acts of the executor, done since the institution of the first proceeding, are so intimately blended with those that were done before it, that proof of the former acts is necessary in order to develop the meaning and effect of the subsequent acts, such former acts may be proved as tending to show causes for removal which have transpired and occurred after the institution of the former proceeding. And in order to effect this, it may be necessary and proper to introduce evidence of the whole course of the executor's administration of the affairs of the estate.

ERROR to the Lincoln Circuit Court, HON. E. M. HUGHES, Judge.

Reversed and remanded.

MARTIN & AVERY, E. T. SMITH, and GEO. T. DUNN, for the plaintiffs in error: Walker G. Meriwether had no such natural or successive relationship to M. A.

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E. Meriwether, or her property interest in the estate of Geo. D. Meriwether, as to make him a privy to her. He is neither her personal representative, heir, devisee, legatee, assignee, voluntary grantee, or judgment creditor, or purchaser from her with notice. He must be one of these to be bound by a judgment against her. *Henry v. Wood*, 77 Mo. 277, 281; *Haley v. Bogley*, 37 Mo. 364; Greenl. Evid., sec. 189. The judgment did not affect or operate upon the condition of the estate, but only upon defendant's relation to it. Its conclusive effect could not be greater upon persons not parties to it than would be the judgment of the probate court in granting letters of administration upon persons not parties thereto as to the fact of death of the person whose estate was being administered. In such cases, though a proceeding *in rem*, the judgment does not conclude persons who are not parties. *Bingham v. Fayerweather*, 1 N. E. Rep. 736; *Carroll v. Carroll*, 60 N. Y. 121; *Emmert v. Stouffer*, 3 Cent. Rep. 236; *Haight v. Brisbin*, 100 N. Y. 219. The proceeding and judgment was *in personam*, not affecting or assuming to affect the estate or *res*. And persons not parties to it are not concluded. *Durant v. Abendroth*, 97 N. Y. 132. If the judgment in that case is binding upon plaintiff it would be equally binding upon creditors. They have the same right, under section forty-three, Revised Statutes, that heirs or legatees have. The settlements made prior to the judgment in the M. A. E. Meriwether case show that he charged the estate interest on all cash balances due him. In his settlement made since the judgment of October, 1886, when cash balances were due the estate from rent of the Aberdeen farm, he fails to charge himself with interest. This last act might be innocent in itself, but when taken in connection with his acts upon the same subject prior to the judgment, shows his purpose to take every advantage of the estate—one act is necessarily connected with and in explanation of the other. There was no such privity of relation or estate between M. A. E. Meriwether and the plaintiff as would bind the latter by an

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adjudication for or against the former in an action in which he was not a party. Freeman on Judg., sec. 171*a; Christman, Adm'r, v. Harman*, 26 Am. Rep. 387; *Hill v. Stevenson*, 18 Am. Rep. 231; *Durant v. Abendroth*, 97 N. Y. 132; *Norcross v. Hudson*, 32 Mo. 227; *Strass v. Ayres*, 87 Mo. 349. Walker G. Meriwether had no such natural or successive relationship to M. A. E. Meriwether, or her property interest in the estate of Geo. D. Meriwether, as to make him a privy to her. He is neither her personal representative, heir, devisee, legatee, assignee, voluntary grantee, or judgment creditor, or purchaser from her with notice. He must be one of these to be bound by a judgment against her. *Henry v. Wood*, 77 Mo. 277, 281; *Haley v. Bagley*, 37 Mo. 364; Greenl. on Evid., sec. 189.

W. H. BIGGS and R. H. NORTON, for the defendant in error: The defendant contends that the judgment in the former trial was conclusive upon the complainant in this cause for the following reasons: (1) Because the proceeding was in the nature of a proceeding *in rem;* (2) because the appellant and M. A. E. Meriwether are privies in estate. Wells, Res Adjudicata, 506. It has been held that the probate or proof of a will is a proceeding *in rem* because it determines the *status* of the subject-matter and that the judgment in reference thereto binds all parties, whether parties to the record or not. *Woodruff v. Taylor*, 20 Vt. 73; *Fry v. Taylor*, 1 Head. 595; *Caskpan v. Dexter*, 13 Gray, 332. Also cases of marriage and divorce are held to be proceedings *in rem*, because judgments and decrees therein fix and define the *status* of the parties. *Greene v. Greene*, 2 Gray, 363. Also as to matters of pedigree. *Ennes v. Smith*, 14 How. 430. And matters of partition as to unknown heirs. *Kane v. Canal Co.*, 15 Wis. 179. Appellant and M. A. E. Meriwether are privies in estate. If this be true then the former is clearly estopped and bound by the judgment in the former suit.

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The term privity denotes mutual or successive relationship to the same rights of property. *Crispin v. Hannovan*, 50 Mo. 415, and cases cited; *Cooley v. Nonen*, 53 Mo. 166.

ROMBAUER, P. J., delivered the opinion of the court.

In September, 1865, George D. Meriwether made his will, containing among others the following provisions: (1) Appointing his brother-in-law, Henry V. P. Block, sole executor, and directing him to sell all real and personal estate in the manner, time, and place he may think best. (2) Directing the payment of a legacy of five thousand dollars to his cousin, Elizabeth M. A. Miller. (3) Constituting his son, Walker G., residuary devisee and legatee.

After making the will the testator married his cousin, the legatee Miller, and when he died, in 1874, he left his widow and son as sole legatees and devisees of his estate under the provisions of the will above recited.

The executor named in the will took possession of the estate as such upon the decease of the testator, under letters testamentary, and has been in possession ever since.

On January 29, 1887, the plaintiff, residuary devisee as aforesaid, filed his complaint in the probate court, alleging that the executor was guilty of a violation of his duties, assigning a number of acts of mismanagement on his part, and praying for his removal. The defendant executor answered denying all charges of mismanagement, and stating as an affirmative defence; "that plaintiff and one M. A. E. Meriwether were the only heirs of said estate; that in 1885 the said M. A. E. Meriwether filed in the probate court of Lincoln county a complaint asking for the removal of defendant as executor of said estate, in which the same causes for defendant's removal were urged as in the complaint of plaintiff in this suit; that said former complaint was tried in the probate court, and on appeal was re-tried in the Lincoln

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county circuit court, at its March term, 1886; that on said trial, there was a full, complete, and final determination of all matters and things set forth in said complaint, and that the decision of the said circuit court therein was, that there was no cause shown for the removal of defendant as executor of said estate, and said proceeding was dismissed; that plaintiff Walker G. Meriwether was present at the trial of said cause, and testified as a witness for defendant."

On the trial of the cause in the circuit court (on appeal from an order of the probate court removing the executor), the plaintiff gave evidence tending to show irregularities in the administration of the estate anterior to the trial of the cause of M. A. E. Meriwether against the defendant. These irregularities were of a character which, remaining unexplained, would have furnished ground for the executor's removal. The plaintiff also gave evidence tending to show that since the institution of the former suit the executor had sold some real estate, part of the estate entrusted to him, for less than its reasonable value. But there was no evidence showing any bad faith on part of the executor in these sales, and it cannot be contended that the acts of the executor in making such sales, standing alone, furnished any ground for his removal.

The plaintiff also gave evidence tending to show the following facts: When Meriwether, the testator, died in 1874, the defendant lived on some lands in Pike county known as the Aberdeen farm, consisting of about eight hundred acres in cultivation. Of this farm, the estate owned 21-32 parts, and the defendant's wife the remainder, so that the defendant, by right of his wife, was a tenant in common to the extent of about one undivided third. The defendant continued to occupy this farm until its sale in 1886. He made settlements in the probate court in 1875, 1876, 1877, 1880, and 1885. In neither of these settlements did he charge himself with any rent of the Aberdeen farm. He testified on the subject as follows: "At the trial of M. A. E. Meri-

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wether in 1886, in the Lincoln circuit court, she complained and urged as a ground of my removal that I had failed to charge myself with the rent of the Aberdeen farm. I had asked Judge Bonfils, the probate judge of Lincoln county, who was probate judge when the administration begun, in reference to this, and he had informed me that all this matter of rent had better be adjusted in a final settlement. After this suit had been dismissed by the court, my attorneys informed me that I had better charge myself with the rent of the Aberdeen farm in my next settlement. As I was a party interested, I thought the rental value of the farm ought to be fixed by disinterested parties." The defendant further stated: "In determining the rents which I ought to charge myself with for the Aberdeen farm, I thought it best to take the opinion of some disinterested men; with this in view, I asked Mr. Pew, Mr. Stoneberger, Mr. Wallace, and Mr. McCune, who were entirely disinterested and were acquainted with the farm, to get together and determine what would be a reasonable rental value for the farm since I had occupied it. I explained to them that I had only charged the estate for all new buildings and new fencing, and that any labor done by my own force on said buildings or fences, I charged nothing for that. I charged nothing for clover or timothy seed. They went themselves and agreed upon the amount which I carried into my settlement of October 13, 1886."

The defendant also stated: "In the former trial, one cause for my removal, as urged, was that I had failed to account for any rent at all for the Aberdeen farm. The reason why this was not done was fully and satisfactorily explained to the judge who tried the case."

It further appeared by the evidence, that the defendant had failed to charge himself with interest on moneys of the estate in his hands at any of the prior settlements, and had also failed to take credit for commissions on disbursements, but that, in his settlement

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made in October, 1886, he did take credit for $1,663.20, on account of moneys disbursed for the estate, as shown by his various settlements since 1875, but did not charge himself with any interest.

When the defendant, introducing his evidence, disclosed that he intended to rely in part upon the former adjudication, the counsel for plaintiff made the following admission:

"It is here admitted by the counsel for the complainant that in the trial of the case of M. A. E. Meriwether against the defendant, there was a full and complete investigation of all matters growing out of the administration of said estate by defendant up to the date of said trial, to-wit, in April, 1886; that the same causes for removal of defendant as executor of said estate were urged in that case as are now urged in this case, except what has happened in said administration since said trial, and that the judgment in said former case stands unreversed and not appealed from."

The record before us contains the following recital as to the further progress of the proceedings in this cause: "Thereupon the court held that all matters passed upon in said former trial were *res judicata* so far as this case is concerned, that the complainant in this case and M. A. E. Meriwether were privies, and that all testimony introduced by complainant in regard to the administration of said estate prior to the trial of said former suit, to-wit, in April, 1886, is excluded from this case, and the defendant required and instructed to direct his testimony to matters that have transpired since the trial of said cause. To this the plaintiff objected and at the time excepted." The defendant thereupon did confine his testimony to such matters only, and the court, at the close of the hearing, dismissed the complaint.

The main error complained of on this appeal is, that the court erred in holding that the complainant was precluded by the judgment in the former suit from

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inquiring into matters which were the subject of investigation in such suit, and adjudicated therein.

It seems that the trial court based its ruling on the view that the complainant and M. A. E. Meriwether were privies. This view was unquestionably erroneous. The complainant was in no sense the heir, devisee, legatee, assignee, grantee, or purchaser of M. A. E. Meriwether. There was no successive relationship of any kind between her and him so as to create a privity of interest or estate in the legal sense of said terms. But an untenable ground assigned for a correct conclusion does not render the conclusion erroneous, and the only question for our consideration is, whether the conclusion of the court arising upon the admitted facts is correct.

Judgments and decrees of probate courts having exclusive jurisdiction of any particular question touching the administration of estates of decedents are mostly in the nature of proceedings *in rem*, and as such conclusive against all the world. Where the matter is exclusively a private litigation the judgment or decree may have the force only of a judgment at common law *in personam*, but where it affects the control or management of the entire estate the rule is necessarily otherwise. Wells Res. Jud., secs. 425, 426; *Cecil v. Cecil*, 19 Md. 79; *Balkum v. Satcher*, 51 Ala. 82; *Steen v. Bennett*, 24 Vt. 303. In the case at bar the question was one which affected the care and custody of the entire estate, and, therefore, necessarily in the nature of a proceeding *in rem*.

Section forty-three, Revised Statutes, provides: "If any executor * * * become in anywise incapable or unsuitable to execute the trust reposed in him, or fail to discharge his official duties, or waste or mismanage the estate * * * the court, upon complaint in writing by any person interested * * * shall hear the complaint, and if it finds it just shall revoke the letters granted."

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A proceeding under this statute is necessarily a proceeding *in rem.* If the executor is removed on complaint of any party interested, such removal, in the absence of fraud, is binding on all the world as a final adjudication of the fact that there was good ground for his removal. If the complaint upon full hearing is dismissed it is on the same principle an adjudication of the fact that no ground for his removal existed, and such adjudication is binding on all the parties interested in the estate in the absence of fraud or collusion. No claim of fraud or collusion was made in this case. Any contrary holding might subject an executor to constantly recurring harassing litigation, while in this holding there can be no hardship to any one. From a judgment in probate matters any party interested in the estate may appeal. If the present complainant was not satisfied with the former judgment, there was nothing to prevent his appeal. He was aware of the judgment. It is not disputed that it was brought about in part by his own testimony, as he was a witness on behalf of the executor. It does not appear that he was an infant or otherwise incapacitated; on the contrary, since the will which names him as residuary devisee bears date in 1865, and the trial of the last suit was held in 1886, it is a reasonable inference that he was not an infant at the date of the last trial.

Holding these views we must necessarily come to the conclusion that there was no error in so much of the court's ruling as holds that all matters *passed upon* in the trial of the case of M. A. E. Meriwether against the defendant could not be inquired into in this proceeding as furnishing ground for the removal of the executor. As an abstract declaration of law this was clearly correct. If matters transpiring after the institution of the former suit stood unconnected with the former administration, they would have to be examined and passed upon with the sole view of determining whether they, in themselves, furnished sufficient ground for the removal

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of the executor. This, however, is not the case. Matters which transpired after the institution of the former suit are so intimately connected and blended with matters transpiring before, that it is impossible to determine their bearing on the conduct of the executor without entering into an examination of the whole administration. To illustrate, the commissions for which the executor took credit since, and for which he has taken no credit in his prior settlements, might have been regarded by the trial court as an offset for his failure to charge himself with interest on moneys in his hands belonging to the estate. His failure to charge himself with the rents of the Aberdeen farm altogether might have been held sufficiently explained at the former trial by the fact that he was advised by the probate judge to reserve that matter for his final settlement. As no evidence of his management of that property was before the court then, the court could make no finding, one way or another, whether he had mismanaged that part of the estate or with what sum he was properly chargeable by reason of his occupancy. When, by his showing at the last settlement, it appeared that that particular property, consisting of eight hundred acres and more of cultivated lands, yielded to the estate during the defendant's occupancy thereof for a period of twelve years only a net aggregate of $833.32, or less than a rental of seventy dollars per month, it became evident that the administration of that particular property, from the very beginning of the administration up to the date of its sale, became a material inquiry in determining whether the executor had violated his trust.

Under these circumstances we must conclude that the court erred in excluding all testimony introduced by complainant in regard to the administration of the estate prior to the trial of the former suit, and that matters transpiring before the institution of the former suit are so intimately blended with matters transpiring thereafter as to properly call for an inquiry into the

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entire administration of the estate from the beginning until the institution of the present proceeding, as essential to the determination of a proper decree.

That this may be done the judgment of the trial court is reversed and the cause remanded. PEERS, J., concurs; THOMPSON, J., concurs in the result.

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CHRISTIAN BECK, Respondent, v. HERMAN HAAS, Appellant.

St. Louis Court of Appeals, May 22, 1888.

1. STATUTE OF LIMITATIONS—APPROPRIATION OF PAYMENT.—When a creditor holds two demands against his debtor, one of which is barred by the statute of limitations, and the other not, and the debtor makes a payment in part, without indicating to which debt it is to be applied, the creditor may, at his option, apply it to the debt under limitation, so as to prevent the statutory bar.
2. PRACTICE—TRUSTEE OF EXPRESS TRUST.—The payee of a promissory note who is named therein as trustee for another, may maintain an action on such note in his own name, without regard to the question whether the beneficiary be living or otherwise.

APPEAL from the Jefferson Circuit Court, HON. JOHN L. THOMAS, Judge.

Affirmed.

WISLIZENUS & KLEINSCHMIDT, for the appellant: (1) Mere payment of money, within ten years, by the debtor to the creditor, does not take a note out of the statute of limitations; the payment, to have such effect, must have been made on the note. *Loeffel v. Harris*, 11 Mo. App. 135; *Phillips v. Mahan*, 52 Mo. 197. (2) Upon the death of a married woman the trust, as to any property held simply to her separate use, ceases—the trustee has no further title. *Roberts v. Moseley*, 51

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Mo. 286; *Baker v. Nall*, 59 Mo. 265; *Liptrot v. Holmes*, 1 Ga. 390; *Steacy v. Rice*, 27 Pa. St. 81; *Comby v. McNichols*, 19 Ala. 750; *Aiken v. Smith*, 1 Sneed, 304; *Smith v. Thompson*, 2 Swan. 386; *Davis v. Rhodes*, 39 Miss. 155; *Peery v. Carnes*, 86 Mo. 656.

THOMAS & HORINE, for the respondent: (1) The payment of money by plaintiff to defendant on his indebtedness, without having given directions at the time of the payments how they should be credited, plaintiff had the right to apply them on the note in suit. *Goddard v. Williams, Adm'r*, 72 Mo. 131; *Carter v. Carter*, 44 Mo. 195. (2) Where a note made payable to a party—administrator, guardian, agent, or trustee of another, or sheriff of a certain county, without more—the party named as the payee has the right to collect, sue for or assign the note, the words administrator, guardian, agent, trustee, and sheriff being merely *descriptio personae*. *Powell v. Morrison*, 35 Mo. 244; *Draper v. Minor*, 36 Mo. 290; *Bradshaw v. Wills*, 38 Mo. 201; *Cook's Ex'r v. Holmes*, 29 Mo. 61; *Nicholay v. Futsche*, 40 Mo. 67; *Calloway v. Johnson*, 51 Mo. 33; *Agr. Works v. Heiser*, 51 Mo. 128; *Jeffries v. McLean*, 12 Mo. 538; *Smith, Adm'r, v. Monks*, 55 Mo. 106; *Brooks v. Mastin*, 69 Mo. 58; *Manufacturing Co. v. Montgomery*, 74 Mo. 101; *Rittenhouse, Adm'r, v. Ammerman*, 64 Mo. 197; *Webster v. Snitzer*, 15 Mo. App. 346; *Lachance v. Loeblin*, 15 Mo. App. 460. (3) Upon the death of a married woman the trust does not cease as to any personal property. The legal title remains in the trustee. *Slevin v. Brown*, 32 Mo. 176.

THOMPSON, J., delivered the opinion of the court.

This action is brought to recover on a promissory note for nine hundred dollars, given by the defendant and another to the plaintiff on the nineteenth of October, 1871, and payable one year after date. The note was barred by limitation at the time the action was commenced, unless it was taken out of the statute by

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reason of certain part payments alleged to have been made by the defendant and endorsed by the plaintiff thereon. In respect of these part payments, the evidence showed that the defendant was indebted to the plaintiff upon this promissory note, upon another promissory note for the sum of three thousand dollars, and also by an open account for refreshments which the defendant had had at the plaintiff's place of entertainment. While the defendant was so indebted, the plaintiff and the defendant both passed into extremely necessitous circumstances. The plaintiff wrote the defendant many dunning letters, not referring to either of the notes or to the open account, and the defendant replied, sending him from time to time little remittances of five, seven, or ten dollars, as he could afford to, two of which were, without the knowledge or request of the defendant, endorsed by the plaintiff upon this note. On June 23, 1877, there was also a credit of fifty dollars on this note, endorsed by the plaintiff, and at the same time a credit of fifty dollars endorsed on the three thousand-dollar note by the plaintiff. The history of this credit, according to the testimony of the plaintiff, which, after the verdict, we are entitled to take as true, was that, at the date when it was made, the defendant had given the plaintiff a note of Anthony & Kuhn for one thousand dollars in general payment, with instructions not to compromise it for less than one hundred dollars; that the plaintiff compromised it for one hundred dollars, and received that amount for it, half of which, fifty dollars, he endorsed on this note, and the remainder on the other note. The testimony of the defendant was to the effect that the small items which from time to time he sent to the plaintiff were not intended as part payments upon the note in suit or any recognition of it, but that he regarded it as barred by limitation and as having ceased to be a liability, and that these items were sent as gifts to relieve the distress of an old friend who had befriended him in former times. The plaintiff, on the other hand, testified that he regarded them as payments.

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The substantial question for decision is, whether these were part payments upon the note in suit such as took it out of the statute of limitations. Part payment will take a demand out of the statute of limitations. Rev. Stat., sec. 3250; *Bridgeton v. Jones*, 34 Mo. 471; *Lawrence Co. v. Dunkle*, 35 Mo. 395; *Callaway County Court v. Craig*, 12 Mo. 95; *Block v. Dorman*, 51 Mo. 31; *Vernon County v. Stewart*, 64 Mo. 408; *Shannon v. Austin*, 67 Mo. 485. But the mere endorsement of a credit on a note without the privity of the maker is not evidence of part payment for this purpose. *Phillips v. Mahan*, 52 Mo. 197; *Loewer v. Haug*, 20 Mo. App. 163; *Goddard v. Williamson*, 72 Mo. 131. The same principle has been applied to the endorsement of a credit on an account without the privity of the party who receives the credit. *Loeffel v. Hoss*, 11 Mo. App. 135. In this case there was a discrepancy between the evidence of the plaintiff and that of the defendant on the question whether these payments were intended as payments on the indebtedness of the defendant to the plaintiff, or whether they were intended as gifts or charitable contributions by the defendant to the plaintiff. This was a question of fact for the trier of the facts (*Minniece v. Jeter*, 65 Ala. 222), and it was resolved in this case in favor of the plaintiff by the finding of the court sitting as a jury.

The interesting question remains whether, in case there are several items of indebtedness having different periods of time to run and expiring by limitation at different times, and the debtor makes payments without specifying upon which item they are to be applied, the creditor can, by the mere act of applying them to a particular item without the privity of the debtor, take that item out of the statute of limitations. The theory on which part payment of a debt takes it out of the statute of limitations is, that it is a recognition by the debtor of the continued existence of the debt and of its obligatory character. Where one who owes to another several distinct items of debt makes general payments, without directing to which item the payment shall be applied,

there is, on principle, difficulty in saying that he intends by so doing to recognize the validity of a particular item which, but for such payments, would be barred by limitation. But it has been observed that the part of our statute of limitations which governs this question is an exact copy of Lord Tenterden's act (Stat. 9 Geo. IV, chap. 14). *Shannon v. Austin*, 67 Mo. 487. We should, therefore, regard the decisions of the English courts construing the statute in the particular now in question as very persuasive, if not conclusive authority. Those courts have held that, where a creditor has two several items against his debtor, one barred by the statute of limitations and the other not, and a part payment is made by the debtor without any express appropriation by him at the time of making it, as to which of the debts it is to apply to, the creditor is at liberty to appropriate the payment towards the satisfaction of that portion of the debt which the statute would bar. *Mills v. Fowkes*, 7 Scott, 444; s. c., 5 Bing. N. C. 455; 3 Jur. 406; *Williams v. Griffith*, 5 Mees. & W. 300. The weight of American authority seems also in favor of this view. Wood on Limitations, sec. 110. We, therefore, hold that when the defendant made to the plaintiff the payments which were endorsed upon this note, without directing to which item of indebtedness they were to be applied, he is to be taken as having authorized the plaintiff to apply them as would best subserve the plaintiff's interest.

Another question is this: The note sued on was made payable to the plaintiff as trustee for his wife, now deceased. It appeared from the evidence that the plaintiff's wife died in 1881, and that no letters of administration had ever been taken out upon her estate. It is, therefore, urged that the action is not well brought, but that it would be properly brought in the name of an administrator of Mrs. Beck, deceased. This point is clearly not well taken. In the first place, no defence other than the statute of limitations was pleaded. In

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the second place, the plaintiff was the legal holder of this note, and whether he held it in a trust capacity or not is immaterial, so far as the rights of the defendant are concerned. As the holder of it, he is the trustee of an express trust, and the action is properly brought in his name under the statute. Rev. Stat., sec. 3463. With the application of the trust fund after he collects it, the defendant has nothing to do.

All the judges concurring, the judgment is affirmed.

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JERE W. CLEMENS, Respondent, v. THOMAS KNOX, Appellant.

St. Louis Court of Appeals, May 22, 1888.

1. LANDLORD AND TENANT—MISREPRESENTATIONS BY LANDLORD.—An assignee of a lease who has covenanted to perform all its terms and stipulations cannot defend against a suit by the lessor for breaches of his covenants, on the ground that the lessor falsely represented to him that the lease was renewed to the defendant's assignors, in consequence of which misrepresentation the defendant has sustained a pecuniary loss, when in fact a copy of the lease was in the defendant's possession and he had all the means of knowledge that the lessor had concerning the fact of renewal; when the defendant and his assignors have held the premises for the full term of renewal, as contemplated, and all the parties concerned have acted throughout upon an understanding of the fact of renewal and complied with all its terms, until the defendant's breaches complained of.

2. LANDLORD AND TENANT—RENEWAL OF LEASE.—A tenant defendant cannot maintain that his lease has never been renewed, on the ground that no writing evidences a renewal on agreed terms, as contemplated in the original lease, when in fact, some time after the expiration of the original term, the defendant took an assignment of the lease from the former tenants, agreeing in writing to abide by and perform all the terms and conditions therein set forth, and the lessor at the same time gave his consent in writing to the assignment, upon the stipulated conditions.

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3. PRACTICE—VERDICT DIRECTED BY THE COURT.—Where the ultimate or constitutive facts are undisputed, and a proper verdict will be merely the conclusion of the law upon such facts, there is no error in a direction to the jury that their verdict shall be in favor of the party for whom the judgment of the law so declares.

4. TAXES — WHEN DEEMED TO BE LEVIED. — Under a stipulation requiring the lessee to pay "all assessments and taxes * * * that may be levied on or claimed from" the leased property during the term of the lease, he will be bound to pay all general taxes which become payable by law within the duration of the term, and all special tax-bills whose issue shall be of a date within the same period.

5. PRACTICE—EFFECT OF GENERAL DENIAL.—Under a general denial, the defendant may substantially maintain a special defence, in disproving the contract asserted against him, by proving that the contract was materially different from the one so asserted. There can be no just complaint if the failure of a special defence be due, not to the rejection of evidence, but to its insufficiency.

APPEAL from the St. Louis Circuit Court, HON. JAMES A. SEDDON, Judge.

Affirmed.

MAURICE MCKEAG, for the appellant: The court improperly sustained the demurrer of plaintiff to part of defendant's answer. It appeared by the plaintiff's petition that as a condition precedent "the rate of rent for the extended term had to be agreed upon," and it nowhere appeared in said petition that such agreement was made. If any of the matter pleaded tendered any defence, in whole or in part, to the action, the demurrer was improperly sustained. *Justice v. Town*, 20 Mo. App. 559; *County v. Sappington*, 64 Mo. 72. It was stated in the answer of defendant substantially, that Clemens induced Knox to pay six hundred dollars for improvements, etc., placed by Carroll and Levy, which by the lease were only bound for rent and taxes, upon the theory that there was a lease and the right of removal of the improvements. The improvements are admitted by defendant, by his demurrer, to be of the value of one thousand dollars; that after the defendant

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had paid his money and been in possession he was told by Clemens he had no lease, and these improvements of the defendant were converted by Clemens to his own use. The answer also averred that Clemens and Knox agreed there was no lease, and entered into a negotiation for a new lease. All of these matters were well pleaded and a good defence. Bigelow on Estoppel, 578; *Stewart v. Goodrich*, 9 Mo. App. 125; *Yate v. Hines*, 24 Mo. App. 619; *Greenway v. James*, 34 Mo. 328; *Cavender v. Waddingham*, 2 Mo. App. 557. The memorandum signed by Clemens without fixing any rate of rent at which the premises were to be re-let for the proposed renewal term is void for uncertainty. Taylor, L. and T. [8 Ed.] p. 386, sec. 333; *Pray v. Clark*, 113 Mass. 283; *Abeel v. Radcliff*, 13 Johns. 299. The mere facts that the defendant occupied the premises and paid the rate of rent in the lease mentioned, after the expiration of the lease, do not, as a matter of law, show that there was such an agreement as provided for by Clemens in his writing. *Bradford v. Patten*, 108 Mass. 153. Even if there are sufficient averments in the petition to show that there was a renewal, notwithstanding that fact, the averment in the answer that Clemens, through his duly authorized agent, and the defendant Knox, in the early part of the term contemplated by the extension in 1885 and 1886, agreed that there was no lease, etc., was a good defence. Any lease under seal may be surrendered or changed by parol. *Prior v. Kiso*, 81 Mo. 241; *Hutchinson v. Jones*, 79 Mo. 496. The party paying is always at liberty to explain how, why, and in what capacity he pays and the circumstances under which the payments were made, for the purposes of repelling any implication that might be inferable from these payments. Taylor L. and T. [8 Ed.] p. 26, sec. 23. The writing signed by Clemens about the time Carroll sold, June 16, 1880, did not provide that in addition to the rate of rent for the extended term to be thereafter agreed upon, Carroll should pay taxes, assessments, etc., or comply with any

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of the stipulations in former lease. It fixed a minimum for the rate of rent, but no maximum, thus reserving in himself the right to do or not to do. This was no agreement as is required by section 3078, Revised Statutes. *King v. Howard*, 27 Mo. 21; *Hug v. Van Bukels*, 58 Mo. 202; *City v. Gas Co.*, 70 Mo. 103. The writing signed by Knox at the time of the assignment only bound him to try and agree as to the rate of rent. Clemens was not bound by his writing, and as no mutual binding existed, neither was bound. Furthermore, Knox signed his writing and paid his money in the belief induced by Clemens of the existence of a lease and of the right of removal of the improvement. These were the acting motives on the part of Knox, but according to Clemens' showing, and in fact, these did not exist; hence, there was a failure of consideration. Kerr on Mistakes and Fraud, 408; *Blair v. Railroad*, 89 Mo. 383, 392; *Yeates v. Hines*, 24 Mo. App. 619. The provision in the lease relied upon by plaintiff, is "to pay all assessments and taxes * * * that may be levied on or claimed * * * during the term of the lease," not that might be charged, assessed, or become a lien during the term—assessment, etc., and levy or claimed different things. *Valle v. Fargo*, 1 Mo. App. 344; *Waterman v. Harkness*, 2 Mo. App. 494; *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268. The special tax bill offered in evidence was issued on the eighteenth day of December, 1886, and paid by Clemens January 27, 1887. It was not competent evidence in this case. The claimed extension expired thirty-first of December, 1886, when demanded, if ever, before the payment on the twenty-seventh day of January, 1887, there is no evidence. No suit was brought on it, and in fact, according to the provision of section twenty-five, of article six, of the scheme and charter of the city of St. Louis, it was not collectible until thirty days from demand of its payment date. The assessment and levy of a special tax is an exercise of the taxing power, and some time is given the owner of the land after the

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assessment is made, before a levy can be made for the enforcement of the payment of the assessment. In the general taxes an assessment is made more than a year before any penalty is attached for nonpayment. The special tax, only thirty days from demand, and as between landlord and tenant it is when the taxes may be paid without penalty is the time fixed to determine who shall be liable for them. This is the proper time, under the language of the original lease, if it was in force.

VALLE REYBURN, for the respondent: The court properly sustained plaintiff's demurrer to affirmative matter contained in defendant's answer. *Dougherty v. Matthews*, 35 Mo. 520; *Dunn v. White*, 63 Mo. 186; *Parker v. Marquis*, 64 Mo. 38; *Wilkerson v. Farnham*, 82 Mo. 678; Taylor's Landl. & Ten. [8 Ed.] sec. 551. The amount of rental provided for the renewal period was sufficiently defined, and was established by the acts of the lessor and the assignee of the lease. *Arnot v. Alexander*, 44 Mo. 25; *City v. Gas Co.*, 70 Mo. 111; *Webster v. Nichols*, 104 Ill. 171, 172; Hermann on Estoppel, sec. 1048, p. 1175; *Insurance Co. v. Bank*, 5 Mo. App. 333; s. c., 71 Mo. 58. The special tax bill, being payable December 18, 1886, at its date was "levied on, or claimed from, said lot of ground, during the term of this lease." Rev. Ord. 1887; City Charter, sec. 25, p. 368; sec. 26, p. 369. The lessee, both by payment of the former rate of rental and by payment of taxes, as by the lease provided, as well as by his prior acceptance of the assignment of the leasehold, and his entry thereunder, during the period of extension, and subsequent to the original term, precluded himself from denying, against the plaintiff, the existence of such renewal term. *Insurance Co. v. Bank*, 5 Mo. App. 333; s. c., 71 Mo. 58. The special tax bill bore date December 18, being thirteen days prior to the expiration of the renewal term. It then became a lien due and payable forthwith, though it bore no interest, or, perhaps, only six per cent., till thirty days

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had elapsed from the date of the demand for payment. This grace or indulgence vouchsafed by the city charter did not make the amount other than a demand against the property existing, and even then payable, though not then in default, in absence of demand for payment thereof. The lessor was entitled to pay this bill the date of its issuance and sue forthwith for its amount, as the bill was a burden imposed on the property by legal authority ; nay, more, a cause of action accrued to him at once on nonpayment of the bill, even without payment on his own part. Taylor's Landl. & Ten. [8 Ed.] sec. 399.

THOMPSON, J., delivered the opinion of the court.

The plaintiff, by a written lease, demised to one Carroll a lot in the city of St. Louis, for a term of two years and ten months, beginning March 1, 1879, and expiring December 31, 1881, at a rental of four hundred dollars per annum, payable quarterly in advance. The lease contained the following provision :

"That, in addition to the annual rent aforesaid, the said party of the second part, or his legal representatives, shall pay all assessments and taxes, of every description, nature or kind whatsoever, whether general or special tax, that may be levied on, or claimed from, the said lot of ground and buildings thereon by the state or city authorities, or any other legal authorities, during the term of this lease."

The lease further provided :

"It is also understood and agreed, by and between the parties hereto, that any failure on the part of the said James P. Carroll, party of the second part, or his legal representatives, in the payment of the said rent, assessments and taxes, within ten days after the same shall become due and payable, etc., shall make and create a forfeiture of the same."

"At the expiration of the term of two years and ten months, the said party of the second part agrees, for himself, his heirs and representatives, to deliver up

quiet and peaceable possession of said lot of ground and the buildings thereon to said party of the first part, or his legal representatives."

"The said James P. Carroll, party of the second part, and all who hold under him, hereby agree to pay double rent for every day that he or any one else in his name shall hold on to the whole, or any part of said lot of ground or buildings thereon, after the expiration of this lease or after the forfeiture thereof."

"All buildings and improvements made or erected on said lot of ground by the party of the second part, or any one claiming under him, are bound for the payment of all rents, taxes and assessments."

Immediately after the signature of the parties at the foot of the lease, and indorsed thereon, and bearing the same date, appears the following:

"James P. Carroll has the privilege of a five years' extension of his lease after the expiration of the lease this day entered into between him and myself for lot on Broadway, in block No. 606, in the city of St. Louis, for two years and ten months, the rate of rent for the extended term to be hereafter agreed upon between us, however, which shall not be less than the amount now paid by him for the use of said lot.

"St. Louis, Mo., JERE W. CLEMENS.

"March 1, 1879."

Following this and endorsed upon the lease was a written consent signed and sealed by Clemens, that Carroll might transfer the lease and the premises therein described to Jonas Isaacs and Jaques Levy, "subject to all the covenants, stipulations and agreements therein contained." Following this was a written assignment, signed and sealed by Carroll, of all his right, title and interest in and to the lease and the premises therein described, to Jonas Isaacs and Jaques Levy. Following this is this endorsement, signed and sealed by Jonas Isaacs alone: "Jonas Isaacs and Jaques Levy hereby promise and agree to comply with all the covenants, stipulations and agreements contained in the within lease." Next

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thereafter there is endorsed upon the lease the following:

"I hereby consent that Jonas Isaacs and Jaques Levy may transfer the within lease and the premises therein described to Thomas Knox, subject to all the covenants, stipulations and agreements therein contained. In testimony whereof, I have hereunto set my hand and seal this twenty-fourth day of April, A. D., 1883. JERE W. CLEMENS. [Seal]

"Witness:

"B. M. CLEMENS."

Next follows this indorsement.

"For value received, we hereby assign all our right, title, and interest in and to the within lease and the premises therein described, to Thomas Knox. In testimony whereof, we have hereunto set our hands and seals this twenty-fourth day of April, A. D. 1883.

"JACQUES LEVY, (Seal)

"JONAS ISAACS. (Seal)

"Witness:

"B. M. CLEMENS."

Next thereafter follows this indorsement:

"I hereby promise and agree to comply with all the covenants, stipulations and agreements contained in the within lease. In testimony whereof, I have hereunto set my hand and seal this twenty-fourth day of April, 1883. THOMAS KNOX. (Seal)

"Witness:

"B. M. CLEMENS."

The lease, and also the various endorsements above displayed, were executed in duplicate, one copy being retained by the plaintiff, and the other copy being delivered to the defendant by his assignor. Under the lease, Carroll first took possession and held until his assignment to Isaacs and Levy; they then took possession and held until their assignment to this defendant Knox; he then took possession and held until the end of the renewal term of five years. Each of the tenants paid rent, according to the stipulations of the lease, at

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the rate of four hundred dollars per annum, payable quarterly. They also paid the taxes, pursuant to the provisions of the lease, down to the year 1886, being the last year of the renewal period, when the defendant refused to pay the general taxes for that year, and also a special tax bill issued for the reconstruction of the street upon which the lot fronted with granite pavement, which special tax bill was issued and dated on December 18, 1886. The plaintiff paid the general tax bill upon February 15, 1887, and the special tax bill on January 27, 1887, and brings this action to recover the aggregate of the taxes so paid. The defendant had remained in undisturbed possession from the date of the assignment of the lease to him, April 24, 1883, to the period of the trial of the action.

The answer was, first, a general denial, and next the following special defence and counter-claim:

"And for further answer to plaintiff's petition, this defendant avers that said plaintiff Jere W. Clemens, on or about the twenty-fourth day of April, 1883, falsely, fraudulently, and with the intention to deceive this plaintiff, knowing at said time the facts he represented not to be true, represented that the lease originally entered into between Jas. P. Carroll and himself, and referred to in his petition, was, by an agreement between himself and Messrs. Isaacs & Levy, renewed on the first of January, 1882, and the rent for said extension, to-wit, for five years, agreed upon and between the said Isaacs & Levy to be four hundred dollars per annum, payable in quarterly instalments, one hundred dollars each quarter; that this defendant thought and believed that said representations so made by the said plaintiff were true at the time, and was thereby induced to pay, and did pay, to Messrs. Isaacs & Levy the sum of six hundred dollars, for their interest in and to said lease and the lands and improvements erected by said Carroll and Isaacs & Levy on said lands and premises; that afterwards, to-wit, on or about October, 1883, and at several

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other times in the years A. D. 1884, 1885, and 1886, the said defendant notified this plaintiff, by and through his duly authorized agents, August Bergman & —— Cornet, that he never had consented to the extension of said lease so originally given to P. Carroll, and assigned by Carroll to Isaacs & Levy, and by them pretended to be assigned to this defendant with plaintiff's consent, and had never agreed with said Isaacs & Levy as to the rate of rent for said premises for an extension, and that consequently this defendant Knox was entirely at the mercy of said plaintiff as to the possession of said premises and ownership of the improvements placed on said premises by the said P. Carroll and Isaacs & Levy, which are of the value of one thousand dollars; that, upon inquiry from said Isaacs & Levy, and their examination and the examination of the pretended lease assigned to this defendant by them, and upon the statements of said duly authorized agents * * * the plaintiff found were true, and consented with and agreed with the said plaintiff that he had no lease on said premises, but was subject to the pleasure and at the mercy of the said plaintiff as to the time he might occupy said premises and improvements; that the said defendant was told by said duly authorized agent that the plaintiff would execute a lease to said premises to this defendant for a term of five years from said years 1884, 1885, and 1886, at these times, being the times at which the defendant was notified by the plaintiff through his duly authorized agents that he had no lease, and solicited to enter into a lease with the plaintiff for said premises by them for a term of five years; that this defendant consented and agreed in the years 1884, 1885, and 1886; that the plaintiff executed a lease for five years and presented it to defendant to sign, but said lease was not as agreed upon, but was for five years, from first day of January, 1882; that this defendant refused to sign said lease thus running from the first day of January, 1882, for five years; that plaintiff kept up a negotiation through said duly authorized agents for a lease with

said defendant for said premises until the first of January, 1887, when he at once appropriated the improvements on said premises put there by said P. Carroll and said Isaacs & Levy to himself, and thus prevented the said defendant from removing the same, which he would have had done if the lease had been in existence, as claimed by plaintiff in his petition; that said improvements were of the value of one thousand dollars."

I. The plaintiff demurred to this part of the answer, assigning as a reason that it did not set forth facts constituting a legal defence to the cause of action set forth in the petition. The court sustained this demurrer. The defendant declined to amend, but stood upon the matters set up in his answer, and then went to trial before a jury upon the issue made by the petition and his general denial. The first assignment of error is the sustaining of this demurrer. We are of opinion that this was not error of which the defendant can now complain. The question must be judged by the whole record, and this shows without controversy that the defendant had a copy of the lease at the time he entered into possession, and knew as well as the plaintiff did whether it had been renewed for five years. He dealt with the plaintiff and with Isaacs & Levy at arm's length, and if the plaintiff misrepresented to him something which he had under his very eyes, it is not a fraudulent misrepresentation of which the law will take cognizance. As the whole matter contained in this special defence is built upon the superstructure that the plaintiff fraudulently induced the defendant to pay Isaacs & Levy for their improvements, by making him believe that the lease was renewed for five years, and then appropriated the improvements at the end of the term—the basis of fraudulent representation failing, the whole defence fails. If the defendant had confessed the cause of action and stood upon this defence, its goodness would be judged alone by the facts therein stated, but, having gone to trial upon the issue made by his general denial of the petition, and having appealed from the

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judgment there rendered against him, bringing to this court a bill of exceptions which embodies a state of evidence which shows, without any room for controversy, that all the parties to the instrument treated the lease as a renewal at the rental which had been fixed in the original instrument, that he enjoyed the possession of the premises during the remaining period of the term of renewal, paying this rental, and also paying, until the last year, the taxes in accordance with the terms of the lease, and as the instrument itself shows, by the endorsements thereon, that when he entered into possession he covenanted to abide by the terms of the lease—it would be a vain and useless thing for us to reverse this judgment in order that an issue might be joined upon the allegations of this special defence, which allegations the defendant could not possibly prove.

II. The argument that, because this agreement for a renewal was endorsed upon the lease by the lessor in the form of a *privilege* to the lessee at a rate of rent thereafter to be agreed upon, and that, as no further contract *in writing* was made between the defendant or his assignors and the plaintiff fixing the amount of rent, there was no renewal, is untenable; because the uncontradicted evidence shows that after the original term had expired and the renewal term had commenced, the lease was assigned by the assignee of the original lessees to the defendant, with the written consent of the lessor, subject to its conditions, which conditions the defendant agreed to abide by and comply with. This in law was tantamount to an agreement on the part of the plaintiff that the defendant should have the premises for the residue of the term at the same rental fixed in the original lease, subject to the same covenants in regard to the payment of general and special taxes, and to an acceptance of this agreement by the defendant.

III. As there was no dispute about the essential facts, that the defendant had entered into this agreement and had enjoyed the full benefit of the unexpired

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portion of the renewal term, subject to the rent reserved in the original instrument, which was the minimum rent at which, under the terms of the renewal privilege, it might be renewed, there was nothing for the jury to try, and no office of judicial administration remained except to pronounce the judgment of the law upon the undisputed facts. Therefore, the court committed no error in directing a verdict for the plaintiff. In a jury trial the court may direct a verdict for the plaintiff where the ultimate or constitutive facts are not disputed, and where the proper verdict is merely the conclusion of the law upon such facts. In such a case, under any theory of the relative office of judge and jury, the fact that the judge directed a verdict is not prejudicial error, unless the judge directed a verdict which does not embrace the conclusion of the law upon the undisputed facts; and this will be next considered.

IV. Did the court direct the proper verdict upon the undisputed facts disclosed by the record? The renewed term of five years expired on the thirty-first day of December, 1886. Were the general taxes for the year 1886 "levied on or claimed from the said lot of ground" prior to that date? The date at which general taxes become payable is fixed by public law, of which taxpayers must take notice. When general taxes become payable they are, in our opinion, levied upon or claimed from the land against which they are assessed, within the meaning of a covenant in a lease such as the one under consideration. It was, therefore, the duty of the defendant to pay the general taxes for 1886, in compliance with his written agreement endorsed upon the lease, "to comply with the covenants, stipulations and agreements, contained therein." *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268.

The evidence in this case shows that the special tax bill for reconstructing the adjoining street with granite pavement was issued to the contractor and dated December 18, 1886, but thirteen days before the expiration of the renewed term. By section twenty-five of

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article six of the charter of St. Louis, which treats of special tax bills for municipal improvements, it is provided: "Said tax bills shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name and by the contractor, as any other claim in any court of competent jurisdiction, with interest at the rate of ten per cent. per annum, after thirty days from demand of its payment date; and if not paid within six months after such demand, then at the rate of fifteen per cent. per annum from the date of said demand." The court is of opinion that the meaning of this language is that the special tax bill becomes a lien from the date of its issue. We regard the decisions of the Supreme Court in *Anderson v. Holland*, 40 Mo. 600, and in *St. Louis v. Clemens*, 36 Mo. 467, construing the analogous provision in a former charter of the city, as controlling this question. We are, therefore, of opinion that the special taxes here in question were "levied on" the land "during the term of the lease" within the meaning of the covenant of the lease which is the foundation of this action.

The judgment is affirmed. It is so ordered. All the judges concur.

ROMBAUER, P. J., delivered an opinion on motion for rehearing.

The defendant claims that the opinion of the court is in conflict with the decision in the case of *State v. Finn*, 19 Mo. App. 560. Although that case was not cited in the brief of counsel, its bearing upon the present case was examined before the opinion was written. In that case the defendant pleaded the general issue and statute of limitations, and the court erroneously sustained a demurrer to the plea of the statute. As it is well settled in this state that the statute of limitations must be specifically pleaded to be available as a defence the defendant by the erroneous action of the court lost the benefit of a well-pleaded defence. *Hunter v. Hunter*, 50 Mo. 445. In the present case the special

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defence set up in defendant's answer might have been established under the general denial, because under a general denial the defending party is always at liberty to disprove the contract asserted against him by proving that it was materially different from the one so asserted. *Wilkerson v. Farnham*, 82 Mo. 672, 679. Moreover it distinctly appears that the defendant sought to establish his special defence by evidence, and failed to do so, not because the evidence was rejected but because it was insufficient.

There is no merit in the motion and it must be overruled. All concur.

MARTIN R. COOK *et al.*, Defendants in Error, v. HENRY F. HARRINGTON *et al.*, Plaintiffs in Error. 31a 199 / 31a 304

St. Louis Court of Appeals, May 22, 1888.

1. PRACTICE—READING PART OF DEPOSITION.—Where an exhibit attached to a deposition contains two commercial agency reports, both of which are referred to by the deponents, it is error for the court to permit the party offering the deposition to read to the jury one of the reports only, against the objection of the adverse party.

2. EVIDENCE—CREDIT GIVEN ON FALSE REPRESENTATIONS.—In a case where the plaintiff claims a recovery on the ground that he was induced to give credit in a sale of goods by false representations of the purchaser's financial condition, it is necessary for him to prove both that the credit was induced by the representations, and that these were untrue. Hence, if there is evidence tending to show that the plaintiff was induced to give the credit by the reports of two different commercial agencies, it is prejudicial error to submit to the jury one of the reports without the other, since the one withheld may have constituted the controlling inducement with the plaintiff, and its statements may have been true.

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Error to the St. Louis Circuit Court, Hon. Shepard Barclay, Judge.

Reversed and remanded.

David Goldsmith, for the plaintiffs in error: The statement charged to have been made by Mr. Endres to Mr. Tuttle differs materially from the report of that statement made to plaintiffs by Bradstreet's mercantile agency, at New York. The alleged statement constitutes but a portion of the said report and the evidence that plaintiffs made the sale of the property in controversy upon the faith of the two agency reports, received by them, as an entirety, not only does not support, but it is at variance with, the claim that the sale was made upon the faith of the alleged statement. The alleged statement of Mr. Endres was not reported as made, and, therefore, furnishes no ground for rescission. The statement made, according to the testimony of Mr. Tuttle, was that Mr. Endres had a capital of twenty thousand dollars in business; the statement reported was that Mr. Endres had a net capital of twenty thousand dollars. The two statements are substantially different because the first does not, while the second does, necessarily imply that the assets of Mr. Endres in the aggregate exceeded his liabilities by the amount stated. In saying that he had a capital of a certain amount in the business, Mr. Endres may have intended to include, and would not have been guilty of fraudulent misrepresentation in including, the borrowed capital which he employed. The use of the term "capital" in that sense and in a statement made, as in the case at bar, to a mercantile agency, was held justifiable, or at all events was held to furnish no ground for the rescission of a contract of sale, in *Dieckerhoff v. Brown*, 2 Cent. Rep. 620. A statement by a vendee to a mercantile agency cannot be ground for the rescission of the contract of

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sale, unless it be reported as made. *Holmes v. Harrington*, 20 Mo. App. 661. The evidence being that the sale was made upon the faith of the two agency reports, where is the possible basis, either in reason or within the purview of the ruling of this court, that it would not have been made but for one sentence in one? And how could the jury reasonably answer the fifth and sixth interrogatories as they did; how could they be reasonably asked to do so, seeing that one of the two reports, upon the faith of which the sale was made, was not read to them, and they were not cognizant of its purport or of a single word therein? The plaintiffs have altogether failed to show, either that they would not have made the sale if the alleged misrepresentation, for which Mr. Endres is responsible, were eliminated from the Bradstreet report, or whether they were induced to enter into the contract by the statements in the agency reports, "which emanated from the contracting party, or by those which emanated from other sources." And yet this court in the case referred to explicitly ruled that, in the absence of proof of both of these matters, there is no evidence that the sale was made upon the faith of the alleged misrepresentation. And the same would be true, if it could possibly be said under the evidence in this case that the sale by plaintiffs was made upon the faith of the Bradstreet report alone. There would even in that case be nothing to indicate whether the statement said to come from Mr. Endres had any weight, or whether the statement of the net worth of Mr. Endres, according to "authorities in a position to know," was not the most credited part of the report, or whether the fact that Mr. Endres enjoyed good credit and was prompt in payments was not, after all, what the plaintiffs cared most for.

GEO. W. TAUSSIG, for the defendants in error: The statement of Endres to Tuttle was reported to Cook & Bernheimer as made, and was competent evidence. Mr. Tuttle testifies that immediately after his visit to Endres,

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on the very same day, he made a written memorandum of what occurred. That memorandum was affirmed by him at the trial as an accurate report made at the time. It is true that Mr. Tuttle, in his oral testimony, given at the trial in 1887, some three years after the conversation, repeats the statement of Endres, without the use of the word "net." But he also affirms as correct in every respect his written report. As a matter of fact, there is no difference between "capital" and "net capital." And in truth and in fact it is the same whether Mr. Endres stated that his capital was twenty thousand dollars, or that his net capital was twenty thousand dollars. If he simply stated that his capital was twenty thousand dollars, he thereby eliminated everything which was not properly included under the sense of capital. If he said that his net capital was twenty thousand dollars, he did not intensify this assertion. "Capital signifies the actual estate, whether in money or property, which is owned by an individual or corporation." *People v. Commissioners*, 23 N. Y. 192. "Capital is the fund upon which it transacts its business, which would be liable to its creditors." *International, etc., v. Commissioners*, 28 Barb. 318. The term capital (as of a banker) does not include money borrowed temporarily in the course of business, but only the property or funds of the banker set apart for other uses. In *Bailey v. Clark*, 21 Wall. 284, the United States Supreme Court said: "It would not satisfy the demands of common honesty if a man engaged in business of any kind, being asked the amount of capital employed in his business, should include in his reply all the sums which in the conduct of his business he had borrowed and had not yet repaid."

Peers, J., delivered the opinion of the court.

This is an action of replevin begun in the St. Louis circuit court on the fifteenth day of April, 1885, and involves the title to fourteen barrels of whiskey. It seems that the whiskey in dispute was sold by the plaintiffs to George F. Endres & Company, in March,

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1885, upon certain representations made by them as to their financial condition. When the whiskey arrived in St. Louis it was levied upon by defendant Harrington, the sheriff of the city, on an execution in favor of one Hartman to satisfy a judgment against George F. Endres & Company. The whiskey was replevied by the plaintiffs, who contend that the sale was voidable on their part, on the ground (1) because the purchaser bought with the intention of never paying for the property, and (2) because the goods were sold on the faith of material misrepresentations made by the purchasers.

The case was tried by a jury on special issues framed by the court bearing on these two questions of fact, and resulted in a verdict and judgment for the plaintiffs.

The question presented here, and about which the only contention is made, relates to the issue as to the alleged misrepresentations and their effect.

The record shows that prior to September, 1884, George F. Endres carried on business under the name and style of George F. Endres & Company, but that at the date mentioned he took one Leo Scheben into the firm without changing the firm's name, and that shortly thereafter one Tuttle, an employe of Bradstreet's mercantile agency, called upon and had an interview with him. At that time Endres was doing business on a borrowed capital of about eighteen thousand dollars, and he had been doing so for a number of years, during all of which he met his obligations promptly and at maturity; but, counting these eighteen thousand dollars as liabilities, as they were in reality, the assets of Endres were in the aggregate somewhat less than his liabilities during all these years. Scheben contributed no capital to the firm, in fact he had none, he having been taken into the firm on account of his supposed ability as a salesman.

The evidence is conflicting as to the nature of the interview above mentioned between Tuttle and Endres.

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Endres testified that he merely stated that the admission of Scheben had not made any change in the pecuniary condition of the firm, but that everything remained as before, and that Scheben had been admitted into the firm only on account of his salesmanship, but had not contributed any capital.

Tuttle admits the correctness of this statement, in so far as it refers to Scheben's condition and the reason for his admission, but adds that Endres also said that he had a capital of twenty thousand dollars, in business. Tuttle further testified that he thereupon constructed for Bradstreet's mercantile agency the following report:

"Sept. 27, '84. Geo. F. Endres and Leo Scheben commenced as above Sept., 1884, succeeding Geo. F. Endres & Co. E. is about forty-five years old and married; he had been engaged in business on his own account except one year, for many years. The business during his early years showed evidence of considerable activity, but of late years said to have retrograded to some extent; prospects at present appear better, however. Mr. E. states his net capital amounts to 20 M., and authorities in a position to know allow him a net worth of 15 M. He enjoys good credit and prompt in payments.

"L. S. his partner said to have contributed no capital to the concern; he was formerly city salesman for Charles Wezler and is considered a good one, well regarded but believed possessed of limited means. His connection with the firm adds no financial strength.

"(BRAD.)"

There is evidence tending to show that this report was forwarded to New York, where the plaintiffs did business. The plaintiffs were subscribers to two mercantile agencies, Bradstreet and Dun & Company, and thereupon having obtained a report upon the firm from Bradstreet, as above set out, also received the following report from Dun & Company:

"Oct. 21st, '84. Geo. F. Endres and Leo Scheben compose the firm. The latter admitted as a partner

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Sept. 6, '84. It is generally understood that they employ about 30 m. in business. S. was for several years in the employ of other parties here, and represented to be a first-class salesman; has been made a partner of E. mainly on account of his ability in that direction. It is claimed that he has about 5 M. in cash, and that is all, although his wife has some resources. This capital, however, S. does not put into his business at present, it being claimed they have sufficient means to conduct the business. S. has been here for several years. They claim to be buying for cash and to discount their bills, and in good credit and standing.

"DUN & Co."

Each of the reports thus obtained was copied into a book kept for that purpose by the plaintiffs. Subsequently, in March, 1885, plaintiffs received an order from Geo. F. Endres & Company, a second order, which included the goods in controversy. Thereupon, one Reuther, the credit clerk of plaintiffs, consulted Mr. Cook, one of the plaintiffs, and they looked at the copies of said agency reports, and on the strength thereof shipped the goods in controversy.

The testimony of the credit clerk on this matter was as follows:

"My name is Leopold Reuther, aged thirty-eight years; I reside at 262 West 132d street, New York, and I am by occupation credit clerk to the firm of Cook & Bernheimer.

Q. "Were you in the employ of plaintiffs' firm as credit clerk in 1884 and 1885?

A. "I was.

Q. "Are you acquainted with Geo. F. Endres and Leo Scheben, or the firm of Geo. F. Endres & Company, of St. Louis, Missouri?

A. "I know them from purchases made from our house of Cook & Bernheimer. I am personally acquainted with Mr. Scheben, and became acquainted with him in 1885.

Q. "Did the firm have any dealings with him in

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the year 1884? If so, when was the first transaction of that year?

A. "We had no dealings with him in that year prior to November 28, 1884. On November 28, 1884, we filled an order forwarded to Cook & Bernheimer November 26, 1884.

Q. "What was done after the receipt of the order by Cook & Bernheimer?

A. "The order was placed in my care, and, finding that we had not done any business with Geo. F. Endres & Company for nearly a year and a half, I ordered one of my clerks, George F. Mansfield, to get a report, and I procured a report from the agencies, R. G. Dun & Company and Bradstreet & Company as to the financial standing of Geo. F. Endres & Company.

Q. "And receiving these reports, what did you do?

A. "I read the reports through and finding therein statements satisfactory, especially a statement made by themselves, and acting upon these reports on the part of plaintiffs, I filled the order.

Q. "And when were the goods shipped?

A. "November 28, 1884, the date of the bill.

Q. "What became of the report you received from Bradstreet's?

A. "They were entered into our reference book, copied into our reference book.

Q. "What page were they entered in your reference book?

A. "On page 309 of plaintiffs' reference book, marked 'F'.

Q. "Do you know in which manner or shape this report was given to you by the agency?

A. "It came on the pencil slips which I read, and which were afterwards copied into this reference book.

Q. "What were done or became of the original pencil slips?

A. "The original pencil slips were destroyed as soon as they were copied in the reference book.

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Q. "Did the plaintiffs receive any further orders for goods from Geo. F. Endres & Company? If so, when and for what goods?

A. "Fifteen barrels of Mayfield whiskey —. This order was filled March 9, 1885, and amounted to $940.86.

Q. "What did you do on receipt of the order for these goods?

A. "Read them and looked at the account of Geo. F. Endres & Company, in our ledger, and finding that the purchase of November had not matured, and that Messrs. Geo. F. Endres & Company's account would be considerably more than at any time previous, I went back to the reports of agencies, testified to before, on page 309 of our reference book, read them over with Mr. M. R. Cook, and finally consented to pass the bill and send the goods upon the strength of the reports.

Q. "Did you believe these reports to be true?

A. "I did.

Q. "Did you send the last bill of goods on the strength and credit of these representations?

A. "I did.

Q. "And upon the strength of these alone?

A. "I did.

Q. "Had you at that time any other knowledge or information as to the means or standing of the firm of George F. Endres & Company?

A. "None whatever.

Q. "In your capacity of credit clerk, and in deciding whether credit should be given to intending purchasers, do you consult with Mr. Cook before giving credit to such purchasers?

A. "I pass most credits without consulting Mr. Cook. Only consult him in credits or matters of importance.

Q. "Did you consult Mr. Cook in this instance?

A. "I did.

Q. "Are these fifteen barrels of whiskey the subject-matter of this suit.

A. "They are."

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It is evident from the foregoing recital that there was substantial evidence before the jury that the goods were sold and the credit extended on the faith of the commercial agency reports. The representations of Endres as to his capital formed part of one of these reports and was found by the jury to be untrue. Thus it results that if both of the agency reports had been introduced by plaintiff the jury would have been in a position to determine whether the representations of Endres, which formed part of one of them, formed a material inducement to the sale. The finding of this fact was essential to their verdict under the decision of this court in *Holmes v. Harrington*, 20 Mo. App. 661, and under the decision of the Supreme Court in *Anderson v. McPike*, 86 Mo. 300. The defendants' first substantial complaint arises upon the rulings of the trial court on the admission in evidence of one of these reports only.

The two commercial agency reports were contained in a paper marked "exhibit A," attached to plaintiffs' depositions. The plaintiffs and their credit clerk in testifying, frequently referred to both, so that there can be no controversy touching the point that they were relevant parts of their testimony, and that their evidence was to a great extent unintelligible and incomplete unless supplemented by these two reports. After other portions of said depositions were read, the plaintiffs offered to read, as part thereof, so much of said "exhibit A," as contained the Bradstreet commercial agency report. To this the defendants objected, insisting that the whole "exhibit A" should be offered by plaintiffs. This objection the court overruled and the defendant excepted. The plaintiffs thereupon read such parts of "exhibit A" only as contained the commercial report of Bradstreet.

This ruling of the court was erroneous. Both commercial reports formed integral parts of nearly all the depositions read by plaintiffs; both were relevant to the issues, and plaintiff was bound to read them both unless

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we are prepared to hold that a party, in reading a deposition taken on his own behalf, may read such portions thereof as suit him and omit the remainder.

In *Hill v. Sturgeon*, 28 Mo. 329, where the same point was considered, the Supreme Court say: "If it is intended to present the point whether a party can read to the jury only such portions of a deposition as suit him, we say that when either party offers to read a deposition which has been taken in the cause, he must read all of it, except, of course, such parts as are decided by the court to be incompetent."

There is some conflict of ruling upon this point in other states, notably in *Gellatly v. Lowery*, 6 Bosw. 113, where WOODRUFF, J., uses this language: "A party who has caused such deposition to be taken does not necessarily, by offering parts of it in evidence, bind himself to read it all, or make answers which are irrelevant or incompetent, admissible." I have been unable to find any authority supporting this view, unless it be in *Forrest v. Forrest*, 6 Duer, 102, where the exact point is not decided, but where the language of the court may be construed into the meaning, as in *Gallanthy v. Lowery, supra.* We are, however, forced to the conclusion that the weight of authority is the other way. In *Ins. Co. v. Knight*, 6 Wharton, 327, 330, the judgment was reversed on the sole ground that the plaintiff was permitted against defendant's objection to read part of a deposition only. In that case SARGEANT, J., says: "It seems to be the same thing as striking out parts of the examination of a witness sworn in the case at bar, at the request of the party who called and examined him. This cannot be permitted. * * * When a deposition has been taken the party who offers it must read the whole. If parts of it be manifestly irrelevant they may on that ground be omitted under the direction of the court; that, however, is not the privilege of the party, but the exercise of a duty by the

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court for the dispatch of business and saving of time and trouble."

But aside from what the courts of other states have held on this question, we feel that this court is bound by the law as laid down in *Hill v. Sturgeon*, *supra*, and we are not aware that the rule thus declared has ever been questioned in this state. In *Prewitt v. Martin*, 59 Mo. 325, and *Norris to use v. Brunswick*, 73 Mo. 258, it was held not to apply to a case where portions of a witness' previous deposition are read for the purpose of impeaching him. Such a case, however, is governed by different considerations.

It follows from the foregoing that the defendant was entitled to have the whole of "exhibit A" read to the jury, and the trial court erred in overruling his objection to the reading of part thereof without reading the whole. It further results that such error is clearly prejudicial, since the Dun report contained additional statements concerning the capital, credit, and solvency of Endres, and since the testimony is clear that credit was extended on the faith of both reports. The Dun report being excluded from the jury they could not intelligently determine whether Endres' statement as contained in the Bradstreet report was or was not a material inducement in extending the credit.

As the judgment must be reversed for this error, we deem it proper to make the following additional suggestions:

Defendants' counsel has argued *in extenso* that no part of the Bradstreet report consists of representations of Endres, since the alleged statement of his capital was not reported as made. That is to say, he reported according to the finding of the jury that he had so much capital, whereas the commercial report stated that he had so much *net* capital. The variation between the statement made and as reported is not, necessarily, wholly immaterial, as counsel for plaintiffs supposes. If the capital of Endres was borrowed on his private account and was in no sense a liability of the firm, and

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yet constituted assets of the firm, the plaintiffs could not well be affected by the fact whether it was borrowed or not. No principle in the law of partnership is better settled than "that the creditor of a partnership has priority over the creditors of an individual member in respect to the funds of the partnership." *Phelps v. McNeely*, 66 Mo. 554; *Hilliken v. Francisco*, 65 Mo. 598; *Shackleford's Adm'r v. Clark*, 78 Mo. 493. This distinction should be kept in view by the court in submitting the case to the jury upon a retrial thereof, which necessarily results from the error committed by the trial court already mentioned.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

STATE TO USE OF ADOLPH BAER *et al.*, Respondent, v. ISAAC M. MASON *et al.*, Appellants.

St. Louis Court of Appeals, May 22, 1888.

PRACTICE, APPELLATE—MOTION FOR NEW TRIAL.—A bill of exceptions which recites merely that "thereupon, after verdict, the defendants filed the following motion for a new trial," does not show that the motion was filed within four days after the trial, and the judgment must, therefore, be affirmed. It is not sufficient that the date of the filing appears in the clerk's minutes. It must appear in the bill of exceptions.

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APPEAL from the St. Louis Circuit Court, HON. DANIEL DILLON, Judge.

Affirmed.

NATHAN FRANK and KRUM & JONAS, for the appellants: In *Duff v. Neilson*, 90 Mo. 93, the court say: "It sufficiently appears from the dates in the transcript

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that the motion for new trial was filed within the statutory period, and this is all that is required." The transcript in this case shows that on November 1, 1887, a verdict and judgment was rendered; that on November 3, 1887, the motion for new trial was filed; that on November 22, 1887, motion for new trial was overruled; that on December 2, 1887, by consent of parties, defendants were granted twenty days in which to file bill of exceptions; the bill of exceptions then sets out the motion for new trial properly with the words that "thereupon, after verdict, motion for new trial was filed in words and figures as follows." This is all shown by the transcript, and it nowhere appears in any of the cases cited by the court that the transcript, or that the record written out separately and apart from the bill of exceptions, indicate the time that the motion for new trial was filed.

David Goldsmith and Dyer, Lee & Ellis, for the respondent: The judgment below must be affirmed, because the record does not disclose that a motion for new trial was filed within the time required by law, in that the bill of exceptions of the appellants does not state that this motion was filed within four days, but, after reciting the verdict of the jury for plaintiffs, merely adds, "and thereupon after verdict," etc. Our position in this respect is conclusively sustained by the following decisions, and the authorities therein referred to: *Demske v. Hunter*, 23 Mo. App. 466; *State to use v. Bank*, 6 Mo. App. 582; *Haarstick v. Shields*, 8 Mo. App. 601; *Bollinger v. Carrier*, 79 Mo. 318; *Bevin v. Powell*, 11 Mo. App. 221, 232; *Clark v. Clark*, 8 Mo. App. 601.

Peers, J., delivered the opinion of the court.

This is an action upon the official bond of the sheriff of the city of St. Louis. The plaintiffs recovered judgment below and defendants appeal to this court. The plaintiffs urge and insist upon an affirmance for the following reasons:

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"6. The judgment below must be affirmed, because the record does not disclose that a motion for new trial was filed within the time required by law, in that the bill of exceptions of the appellants does not state that this motion was filed within four days, but after reciting the verdict of the jury for plaintiffs, merely adds, 'and thereupon after verdict,' etc.

Upon this question the record discloses the following entry as set forth in the bill of exceptions on page 144:

"Thereupon after verdict, the defendants filed the following motion for a new trial." This is all the bill of exceptions shows as to when the motion for new trial was filed.

An unbroken line of decisions could be cited if necessary to show that the bill of exceptions must affirmatively set forth that the motion for new trial was filed within four days, but in view of a very recent decision by the Kansas City Court of Appeals, in a case almost identical with the one before us, we deem it unnecessary to refer to former cases decided by the courts of this state on this question.

In *Demske v. Hunter*, 23 Mo. App. 466, the case referred to, the bill of exceptions recited: "Thereupon the defendant filed his motion for a new trial," etc. The only difference between that bill and the one before us lies in the words "after verdict" being used in this bill after the word "thereupon". In both cases the word "thereupon" is all that is used to indicate the time when the motion is filed. The words "after verdict" have no significance in this connection, as the motion must be filed after verdict always, whether within the time required by statute or not. Motions for new trial are not filed before the verdict is rendered, but following that event in the trial; hence the words in this bill "after verdict" does not signify that it was within the four days required by law. In *Demske v. Hunter*, above referred to, the court, speaking through ELLISON, J., says: "'Thereupon', in the connection

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here used, may mean immediately, or it may mean by reason of, or in consequence of. That is, by reason of the rendition of the verdict, or in consequence of it, the defendant at *some time* afterwards filed his motion. The use of the word 'thereupon' without more, does not then make it appear affirmatively that the motion was filed within the time limited by statute. We cannot, therefore, take notice of the bill of exceptions in this case." 23 Mo. App. 469.

On motion for rehearing in the same case, the court adds: "It must be made to appear *by the bill* 'that the motion was filed within four days.' The word 'thereupon' does not so show it. As defined by lexicographers it may mean that it was within four days or it may mean no fixed period. There is no necessity for experiments in matters of this sort. The date of the filing should have been given or the statement should have been made that it was within the four days allowed by law." *Ibid.*

It is not sufficient that the filing of a motion for new trial appears to have been entered on the clerk's minutes, but such filing, and the date thereof, must be shown by the bill. *State ex rel. v. Gaither*, 77 Mo. 304. As the plaintiffs insist upon an affirmance as above set forth, we can take no further notice of the bill of exceptions in this case.

Seeing no error in the record proper, the judgment will be affirmed. THOMPSON, J., concurs; ROMBAUER, P. J. having been of counsel, does not sit in the case.

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ALBERT PRIBE, Defendant in Error, v. WILLIAM H. GLENN *et al.*, Plaintiffs in Error.

St. Louis Court of Appeals, May 22, 1888.

SALE—DEFRAUDING CREDITORS—INNOCENT PURCHASER.—A sold a stock of goods to B with the intent of hindering, delaying, or defrauding A's creditors, and B sold and delivered the goods to C, who had no knowledge of or participation in the fraud, and thereupon C gave his check for the purchase money to B, who deposited it in the bank, taking a certificate or ticket of deposit as for so much cash. *Held:* The transactions vested a complete title to the goods in C, against which an attachment and levy in behalf of A's creditors could not prevail.

ERROR to the Ralls Circuit Court, HON. THEODORE BRACE, Judge.

Affirmed.

ANDERSON & FOREMAN and W. H. MORROW, for the plaintiffs in error: In case of a sale and transfer of personal property by a vendor with intent to hinder, delay, or defraud creditors, the purchaser, to be protected in such sale and transfer, when contested by such creditors, must have bought and paid for the property in good faith and for valuable consideration without notice of such fraudulent intent either at time of purchase or payment, and to constitute the payment required by law it must have been actually made in money or property, or the purchaser before the time of such notice must have so bound himself as to be absolutely responsible for the amount of the purchase price. *Arnhold v. Hartwig*, 73 Mo. 485; *Dougherty v. Cooper*, 77 Mo. 528. The defendant in error being in possession at the time the goods in controversy were levied upon by the plaintiffs in error under writs of attachment, could not after such levy make payment or bind himself to pay, such levy constituting sufficient notice in law to him.

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Dougherty v. Cooper, 77 Mo. 528. Instruction number four, given for defendant in error is erroneous because, as between Carmichael and the defendant in error, the check taken in payment was an ordinary bank check drawn by defendant in error on his bank account and payable to Carmichael, and was subject to being countermanded at any time by the defendant in error before it was presented and paid by the bank. The check gave Carmichael no right of action against the bank if not paid, and being a fraudulent vendor he could have no right of action against the defendant in error for countermanding the check, the consideration thereof failing. *Dickenson v. Coats*, 79 Mo. 250; *Arnhold v. Hartwig*, 73 Mo. 485. The instruction was wrong because there is no evidence to support any such instruction. The check was given and accepted in payment as usual in ordinary business transactions. There was no agreement made by Carmichael that he would accept the check in absolute discharge, and there was none made by defendant in error that he would in no event countermand its payment, and even if he had made such an agreement in favor of Carmichael, the agreement would not have been binding because of the fraud of Carmichael, and a failure of consideration. The evidence is uncontradicted, and the jury so found in their special findings, that Carmichael was a party to the fraudulent sale. This being so the defendant in error could have made no agreement with him, nor executed and delivered to him any check or other paper in payment for the goods in question, upon which he would have been bound to Carmichael upon notice of the fraud. 1 Parsons on Contracts, 462; 2 *Ibid.* 767. The bank at the time it was notified by defendant in error not to pay check had not in fact given Carmichael credit by delivering him a certificate of deposit. The cashier had only given him a counter certificate the night before, which is not a certificate of deposit, but only a deposit ticket, and having no element of negotiability about it. The check deposited was drawn on another bank, and deposited in Exchange

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Bank without any express agreement that the same was accepted as cash; and only the fact existed that credit was given, as is customary in case of bank depositors. Morse on Banks and Banking [1 Ed.] 320, 326; *Trust Co. v. McDonald*, 51 Cal. 64; Newmark on Bank Deposits, sec. 209; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675. The check given by defendant in error was not negotiable under the law of this state. *Bailey v. Smock*, 61 Mo. 213; *Bank v. Bank*, 3 Mo. App. 362; *Lowenstein v. Knoff*, 2 Mo. App. 159. Bank checks are not bills of exchange. *Merchants' Bank v. State Bank*, 10 Wall. 647. It makes no difference in this case whether the check was negotiable or not. It had not, in fact, been negotiated at time of notice given by Pribe. It had been simply given to the cashier of the bank for deposit, and that out of banking hours, and there is no evidence in the slightest degree tending to show any purchase of the check or agreement to purchase by the bank. The ordinary and regular certificate in deposit issued by banks, much more their counter certificates, or deposit tickets, are not negotiable instruments of this state. *Bank v. German Bank*, 3 Mo. App. 362.

BIGGS & REYNOLDS, for the defendant in error: The jury found that the sale from Todd to Carmichael was fraudulent, but before the judgment could be for plaintiffs in error, it must appear either that Pribe was not a *bona-fide* purchaser for value, that is, that he purchased with notice of the fraudulent intentions of Todd and Carmichael, or that he had notice of this before paying for the goods or before he became responsible therefor. That absolute payment can be made in this state by check or note has been well settled. *Appleton v. Kennan*, 19 Mo. 637; *Howard v. Jones*, 33 Mo. 583; *Block v. Dorman*, 51 Mo. 47; *Wiles v. Robinson*, 80 Mo. 47; *Commiskey v. McPike*, 20 Mo. App. 82; *Sturdevant v. Peterman*, 21 Mo. App. 512. Leaving out of question the agreement between Carmichael and Pribe that the check should be received as an absolute payment for

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the goods purchased, our contention is that as the check had been transferred to the Exchange National Bank (and that we regard it as a non-negotiable instrument) yet the creditors of Todd had no right to demand that Pribe should countermand or stop the payment of the check and incur the chances and expense of a litigation with the Exchange Bank. The check had been transferred to the bank by Carmichael and a certificate of deposit issued to Carmichael, by which the said bank became the legal owner and holder of the check, and if not paid when presented the bank's right of action against Pribe became fixed. If Pribe should stop the payment of this check he would necessarily take upon himself the burden of proving the fraudulent character of the trade between Carmichael and Todd. The drawing of an ordinary check on a bank deposit does not operate as a legal or equitable assignment of the money due the depositor or any part thereof. But if the check is drawn on a particular fund, or for the whole sum due the depositor, or if the check contains any words of transfer, then the drawing and delivery of a check does operate as an equitable assignment of the deposit. *Dickason v. Coates*, 79 Mo. 251. The check reads as follows:

"Louisiana, Mo., January 15, 1886.

"Pay to order of J. C. Carmichael eight hundred dollars in full for all goods in store formerly owned by Asa Todd.

"$800. A. Pribe.

"To Mercantile Bank, Louisiana, Mo."

It is true as contended by counsel for plaintiffs in error, that an ordinary bank check is not a negotiable instrument under the law in this state and the reason is that every negotiable instrument under our statute must contain the words "value received." In other words, in order to render any instrument negotiable, a consideration must be expressed or mentioned in the instrument itself. In the case at bar the check itself states

the consideration for which it was given which renders it negotiable.

PEERS, J., delivered the opinion of the court.

This is an action in replevin for a stock of merchandise, commenced on the sixteenth of January, 1886, in the Louisiana court of common pleas, and by change of venue transferred to and tried in the circuit court of Ralls county, Missouri.

As a matter of convenience in discussing the case, the parties are referred to as plaintiff and defendant as they appear in the record of the trial below. The plaintiff in error being the defendant below and "*vice versa*."

The facts are, that plaintiff owned three adjoining store-rooms in the city of Louisiana. In one he kept a carriage-shop, in another he and one Suda carried on a hardware business, and the third was rented to Todd who was a grocery merchant. On the evening of January 15, 1886, as plaintiff and Suda were going home, the latter asked plaintiff if he had bought any goods out of the Todd stock that day, and receiving a negative answer, Suda then told plaintiff that the goods were being sold very rapidly, far below cost, and by the next night would all be sold. Suda also suggested to plaintiff the idea of buying the whole stock and putting plaintiff's son in the store to run it and thereby prevent the store-room from becoming vacant.

It further appears that on the fourteenth of January the stock of goods was owned by Asa Todd, who, on the morning of the fifteenth, sold them to J. C. Carmichael. It further appears that, during the morning of the fifteenth, Carmichael had come into the store-room of plaintiff and informed him that he (Carmichael) had bought out Todd and that plaintiff must now look to him for his rent. The evidence further shows that plaintiff knew very little about Carmichael and nothing at all about Todd's business or his creditors. It appears that Carmichael requested plaintiff to purchase the

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stock, putting the price at thirteen hundred dollars. No trade was made, however, at this time. Afterwards, various offers being made, a sale was effected at eight hundred dollars. Carmichael wanted the money, but plaintiff told him he would have to wait until banking hours next morning. Carmichael insisted that he was compelled to leave town that night, and offered to take plaintiff's check in full payment for the stock of goods, to which plaintiff assented, and the check was given on the Mercantile Bank of Louisiana. Thereupon, Carmichael took plaintiff into the Todd store and put him in possession. In the meantime, it seems plaintiff had seen the father of Todd and inquired of him if he had any interest in the stock of goods. The elder Todd replying in the negative, plaintiff, as above stated, finally closed the purchase. It appears, also, that Carmichael had been selling goods cheaply and rapidly all day, but how much he realized in this way, or how much the stock was reduced, does not appear. Todd, at this time, owed some St. Louis firm about one hundred dollars, which Carmichael was anxious to secure, and the agreement between him and Todd was that Carmichael should pay Todd the excess of the purchase price remaining from the sale of the stock after satisfying Carmichael's claim. After Carmichael had placed plaintiff in possession, he hunted up Hawkins, cashier of the Exchange Bank, of Louisiana, and deposited the check given him by plaintiff, and received therefor a "counter certificate of deposit." Just what this paper given by Hawkins contained, and just how it differed from any other certificate of deposit, the record does not disclose. The next morning after the purchase, an attorney of the city, claiming to represent the creditors, informed plaintiff there would be trouble, and that if he had not already paid for the goods, he should not pay the money. Plaintiff thereupon went to his bank, found the check had not been paid, and stopped payment thereof. At the suggestion of his cashier, he went

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to the Hawkins bank, where he was informed by Hawkins that the check had been "cashed"; when plaintiff returned to his store, he found the goods attached and in the sheriff's hands. Later in the day, plaintiff recalled the order to his bank not to honor the check, and directed the bank to pay the same when presented, and suing out his writ of replevin, secured the goods, and upon the trial of the case, the verdict was in his favor. After the usual proceedings below, the defendants bring the case here by writ of error.

The jury found a general verdict for the plaintiff, the special issues and findings being as follows:

"1. Was the transfer of Todd's stock of goods from Todd to Carmichael, made on the fifteenth day of January, 1886, effected by Todd and Carmichael for the purpose of hindering, delaying, or defrauding Todd's creditors? Ans. Yes.

"2. What was the money value of the stock of goods sold January 15, 1886, by J. C. Carmichael to Albert Pribe? Ans. $1,000.

"3. Had the check of eight hundred dollars, given by Pribe to Carmichael, been presented for payment or acceptance at the Mercantile National Bank at the time the sheriff seized the goods here in controversy under the writs of attachment read in evidence in this case? Ans. No. Not at the Mercantile Bank.

"4. Did plaintiff Pribe stop or countermand the payment of said eight hundred dollar check, before it had been presented to the bank on which it was drawn, for payment of acceptance? Ans. Yes.

"5. Were the goods here in controversy in the hands of the sheriff under attachment, when plaintiff agreed to or directed the payment of the eight hundred dollar check given by him to Carmichael? Ans. Yes."

The instructions are too many and too lengthy to set out here. Those given for both plaintiff and defendant covered the whole case and fairly presented the law, unless the one numbered five, given on behalf of plaintiff be erroneous, which, and the legal propositions

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therein contained, we shall presently discuss. There can be no question that the jury in their general verdict found the facts in plaintiff's favor as to any knowledge of or participation in the fraud on his part. Defendants' first instruction completely covered these questions, and the special findings of the jury, as above set out, are not inconsistent with the general verdict.

The only question that can be raised with reference to them lies in the third and fourth and is the same question that is involved in plaintiff's fifth instruction already referred to which was given by the court and is as follows:

"5. If the jury believe from the testimony in the case that Carmichael had transferred plaintiff's check to the Exchange National Bank, and the said bank had given Carmichael credit therefor by delivering to him a certificate of deposit for the amount of said check, without any knowledge of any trouble in connection therewith, then the plaintiff Pribe was liable to said bank for the amount of said check, and such a state of facts would constitute payment for said goods within the meaning of plaintiff's third instruction."

We are not inclined to attach much weight to the recital in the check itself, that it was "in full for all goods," etc. It is not necessary to decide here just what legal signification should or should not be given to these words; the question can be determined upon the check independently of these words, or of any strength they add to the plaintiff's position. But there can be no doubt that the check was given and accepted in full payment for the goods. Plaintiff stated he could not get his money until morning, whereupon Carmichael proposed to take his check in payment, assigning as a reason that he was going to leave that night, and could not wait until morning to get the money. Plaintiff then says: "I will give the check," and it was given; Carmichael accepted it and turned over the goods to plaintiff,—hunted up Hawkins, the cashier, and told him he had "some money to deposit", delivered the check to

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the cashier and received a "counter check", or "credit ticket" for it.

It is clearly established that Carmichael bought of Todd, took possession and sold off the stock as fast as he could for one day, and that, while he was thus in possession and selling, he disposed of the stock remaining to plaintiff, at an agreed price and took plaintiff's check in payment instead of the actual cash. This check then became the property of Carmichael as absolutely as would the money, had plaintiff given him that in place of the check.

Plaintiff was put in complete possession of the stock of goods and the trade was consummated as to both; plaintiff could not then have rescinded without Carmichael's consent, by stopping the payment of the check, or in any other way.

There is no question but that at the time the goods were attached they belonged to plaintiff as against everybody excepting creditors, and against them, unless they could show that plaintiff had knowledge or reasonable grounds to suppose when he bought of Carmichael that Carmichael held in fraud of these creditors. But this question was submitted to the jury on the instructions, and they passed upon it in the general verdict, finding plaintiff without fraud or knowledge of fraud.

This leads to the conclusion that the fifth instruction was properly given. Citations are unnecessary, the facts are fully set forth and the legal principles involved so well established as to become elementary.

As to the other question, *i. e.*, objection to the testimony, we fail to find in the record any exceptions saved by the defendants to the ruling of the trial court on this point.

A careful examination of the entire record, as well as the brief and authorities cited by the industrious counsel for defendants, fails to disclose any error which would justify our interference with the verdict and judgment of the trial court.

Judgment affirmed. All concur.

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CAROLINE E. BLAIR, Respondent, v. MOUND CITY RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, May 22, 1888.

PRACTICE — INSTRUCTION — COMMENT ON EVIDENCE. — In an action against a street railway company for damages caused by the defendant's negligence in starting the car while the plaintiff was alighting, an instruction to the effect that certain acts of the plaintiff were "all that the law required of her, so far as diligence on her part in getting off the car is concerned," and that under such circumstances the starting of the car was "an act of negligence on the part of the defendant", is erroneous, as being a comment on the evidence.

APPEAL from the St. Louis Circuit Court, HON. DANIEL DILLON, Judge.

Reversed and remanded.

HITCHCOCK, MADILL & FINKELNBURG, for the appellant: The court erred in giving the first instruction asked by plaintiff. In this instruction certain portions of plaintiff's evidence are selected and commented on, and the jury are told that if true they constitute diligence on the part of the plaintiff and negligence on the part of defendant. Singling out certain facts and instructing the jury as to the effect to be given them is erroneous. *Clay v. Railroad*, 17 Mo. App. 629; *Pourcelly v. Lewis*, 8 Mo. App. 593; *Weil v. Schwartz*, 21 Mo. App. 372, 382; *Jones v. Jones*, 57 Mo. 138; *Anderson v. Kincheloe*, 30 Mo. 520; *Fine v. Public Schools*, 39 Mo. 59, 67; *Rose v. Spies*, 44 Mo. 20; *Spohn v. Railroad*, 87 Mo. 74; *Judd v. Railroad*, 23 Mo. App. 57; *Miller v. Marks*, 20 Mo. App. 369. The first instruction for plaintiff is also erroneous in withdrawing from the jury the question of negligence and diligence. Where the facts are in dispute or the inferences which may be drawn from them are doubtful, the

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jury must decide. *Barton v. Railroad*, 52 Mo. 253; *Meyer v. Railroad*, 40 Mo. 151; *Kelly v. Railroad*, 70 Mo. 604, 608. The court erred in refusing defendant's instruction on the subject of mere accident or misadventure. *Sawyer v. Railroad*, 37 Mo. 240, 260, 262; *Frick v. Railroad*, 75 Mo. 542; 1 Thompson on Negligence, 61, 338; 2 *Ibid.* 1234.

COLLINS & JAMISON, for the respondent: The trial court placed the law fairly before the jury in a few plain, forcible, and pointed instructions. It is not proper to single out one instruction and to complain of it as erroneous; all of the instructions are to be considered in their combination and entirety, and not as though each separate instruction was intended to embody the whole law of the case. *Talbot v. Mearus*, 21 Mo. 427; *McKeon v. Railroad*, 43 Mo. 405. The trial court committed no error in refusing defendant's instruction on the subject of mere accident or misadventure, because there was no evidence introduced or offered tending to show that the injury was caused by mere accident or misadventure, and it is error to give an instruction as to a material issue when there is no evidence on which to base such an instruction. *White v. Chaney*, 20 Mo. App. 389; *Bank v. Armstrong*, 62 Mo. 59.

PEERS, J., delivered the opinion of the court.

The plaintiff in this case is an aged negro woman, who sues for damages for personal injuries claimed to have been sustained by her through the negligence of the defendant company.

In her petition she alleges that she was a passenger on one of defendant's cars; that the car was stopped for the purpose of permitting her to alight therefrom; that while in the act of getting off the car, using due diligence and care, the agents, servants, and employes of the defendant in charge of the car, negligently and

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carelessly and without giving plaintiff sufficient time to alight, put the car in motion, whereby she was thrown down upon the street, her leg and thigh fractured and broken in three places, and otherwise greatly injured and bruised. She asks for ten thousand dollars damages.

The answer is a general denial.

The case was tried before a jury which resulted in a verdict and judgment for plaintiff for five hundred dollars. After an unsuccessful attempt by motion to set aside the verdict and for a new trial, the case comes here by appeal.

The admission and rejection of testimony and the giving and refusing of instructions are assigned as error upon which we are asked to reverse the judgment.

Like almost every case of this character the evidence presented various disputed questions of fact for the jury, viz. : Whether the alleged accident occurred upon one of the defendant's cars or upon the car of another railway company operating cars on the same track; whether the alleged accident was caused by any negligence on the part of defendant's agents or by the intervention of a stranger in ringing the bell as a signal for the car to start before plaintiff had fully alighted from the step of the rear platform; whether the injury was the result of a mere accident for which neither party was to blame, or whether plaintiff contributed thereto by her own negligence in endeavoring to leave the car while in motion. The evidence tended to show that the accident was not made known to the employe of the defendant in charge of the car, and that defendant had no knowledge of the matter until suit was brought; that the cars operated by the defendant were small cars in charge of a driver without a conductor, that the cars operated by the other street railway company were double platform cars and in charge of a driver and conductor. The evidence further tended to show that the defendant had a somewhat deformed limb before the accident occurred, one leg being a little

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smaller and the foot averted; that the injuries resulting from the accident were contusions and bruises; the surgeon who testified declined to say that there had been any fractures, but that a fracture was suspected when she was brought to the hospital, and that her limb was put into a splint as for a fracture. She remained at the hospital three months and was then transferred to the poorhouse, and from thence to her home in the city. It was further shown that the plaintiff went on crutches for a long time after the accident.

I.

A careful inspection of the record does not justify us in interfering with the judgment on account of the testimony, nor is the same insisted on by defendant. The evidence was very conflicting, but the jury having found the issues for the plaintiff thereon, we will not disturb their finding on that account.

II.

The plaintiff asked, and the court gave, the following instructions, against the objection of defendant.

"1. The court instructs the jury that if they believe, from the evidence, that, on the eighth day of September, 1885, the defendant was a street railway company, engaged in the business of transporting passengers, for hire, over certain streets of the city of St. Louis, then it was the duty of defendant's servants and employes on the occasion in question, if they had stopped the car to let passengers get off, to stop the car long enough for plaintiff, by the exercise of ordinary care and diligence, considering her age, sex, and apparent physical condition, to get off the car safely before it was started, or suffered to start, and if the jury further believe from the evidence, that on said eighth day of September, 1885, the plaintiff was a passenger on a car operated by the defendant, its servants, or employes, and that plaintiff, as soon as said car stopped, for the purpose of

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permitting passengers to alight therefrom, got up from her seat and walked at once, as fast as she reasonably could, out on the platform and down the step on the car without stopping on the way, then she did all the law required of her, so far as diligence on her part, in getting off the car is concerned, and if, under such circumstances, the defendant's servants or employes started the car while she was proceeding to alight, still using due and reasonable haste in getting off the car, such starting of said car was an act of negligence on the part of defendant, and a breach of its duty to plaintiff as a passenger on its road."

"2. Although the jury may believe, from the evidence, that on the occasion in question the car had started when the plaintiff attempted to alight, yet, if the jury believe, from the evidence, that the car had not stopped a reasonable length of time for her to get off, using reasonable diligence, considering her age, sex, and apparent physical condition, and that the motion of the car was yet slight, or almost imperceptible, when she attempted to step off, still it is for the jury to determine, under all the circumstances of the case, and the other instructions of the court, whether plaintiff was guilty of negligence in so endeavoring to alight."

"3. The court instructs the jury that if they believe from the evidence that the defendant is a street railway company, engaged in the business of transporting passengers for hire over certain streets of the city of St. Louis, and that on the eighth day of September, 1885, the plaintiff was a passenger upon one of the cars operated by the defendant, its agents or employes, and that defendant's car on the said occasion did not stop at the place where plaintiff desired to alight therefrom after being signaled to stop, a reasonable length of time for plaintiff, considering her age, sex and apparent physical condition, to get off the car before it started, and that the car, through the carelessness or negligence of defendant or its agent or servant in charge of said car, was started while the plaintiff, without negligence on her

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part, was alighting from defendant's car, using ordinary care and diligence on her part, and that the plaintiff, by reason of such negligence and careless starting of the car, was thrown down and injured, then and in that case the jury will find for the plaintiff, and assess her damages at such sum as will compensate her reasonably for the injuries sustained by her, not exceeding the sum of ten thousand dollars."

"4. The court instructs the jury that the burden of proof is upon the defendant to show that the plaintiff, on the occasion in question, was herself guilty of negligence directly contributing to the injury in controversy."

"5. The court instructs the jury that if they find for the plaintiff, then, in estimating the damages, they should take into consideration the age and physical condition of the plaintiff, the pain and suffering occasioned her by the injury and naturally incident to the injury, the character of such injury, whether temporary or permanent, and in view of all of such facts award such sum not exceeding ten thousand dollars as in your judgment will be a just and reasonable compensation for the injury sustained."

The court also gave the following instructions as asked by the defendant:

"1. The court declares the law to be, and so instructs the jury, that though they may believe that the defendant was guilty of negligence, yet if they further believe from the evidence that the plaintiff, Caroline E. Blair, by the exercise of ordinary prudence and caution, could have avoided the accident, they must find for the defendant."

"2. The court declares the law to be and so instructs the jury, that if they believe that the plaintiff Caroline E. Blair was injured by reason of her own negligence, and not by the negligence of defendant, they must find for defendant, although they may believe that she was thrown to the ground by the car being in motion while she was in the act of stepping from said car."

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"3. If the jury believe from the evidence that the car upon which plaintiff was riding as a passenger at the time of the accident was not a car belonging to or operated by the defendant, the Mound City Railway Company, but a car of some other railway line, then the verdict must be for the defendant."

"4. The court instructs the jury that if they have any sympathy for or prejudice against either of the parties to this suit, they must not permit such sympathy or prejudice to affect their consideration of the case, but they must decide the same according to the evidence under the law as given them in the instructions by the court."

"5. The court declares the law to be, and so instructs the jury, that if they believe from the evidence in this case that the plaintiff, Caroline E. Blair, attempted to get off the rear platform of one of the defendant's cars while the same was in motion, and that the driver or person in charge of said car did not know, and by the exercise of reasonable diligence could not have known that she intended to alight from said car while in motion, and if they further believe that by reason of such an attempt and the motion of said car she was thrown to the ground and injured, then the jury must return a verdict for the defendant."

"6. The court declares the law to be, and so instructs the jury, that the ground of plaintiff's action against the defendant is negligence on the part of the defendant, and such negligence is not to be presumed by the jury, but must be established by the plaintiff to their satisfaction by proof."

Defendant also asked the following instruction which was refused:

"If the jury believe from all the evidence in this case that the injury sustained by the plaintiff was the result of a mere accident or misadventure, and that the same was not caused by any negligence on the part of defendant or its servants, then they must return a verdict for the defendant."

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The court gave the following instruction of its own motion, by altering one of the instructions asked by defendant:

"If the jury believe from the evidence in this case that the injury sustained by the plaintiff was not caused by any negligence on the part of defendant or its servants, then they must return a verdict for defendant."

The principal objections urged by the defendant are directed to the first and third instructions given by the trial court for plaintiff.

As to the first instruction it is argued that it recites certain features of the testimony favorable to plaintiff and unduly impressed them on the minds of the jury, embodying an argument on the facts and leading the jury, from a chain of supposed circumstances bearing on the question of negligence. We are of opinion that the objection to this instruction is well taken. It is certainly a commentary on the evidence. It singles out particular facts, elements of proof bearing on the question of negligence and tells the jury such "was an act of negligence on the part of defendant." In *Weil v. Schwartz*, 21 Mo. App. 375, an instruction which said: "The fact that defendant offered to guarantee the debt of the plaintiffs for ten per cent. thereof does not defeat a recovery in this case," was held faulty as a commentary on the evidence. So in *Jones v. Jones*, 57 Mo. 138, it was held in an opinion delivered by NAPTON, J., that "An instruction commenting on particular portions of the testimony, to the exclusion of others, although correct *pro tanto*, is calculated to mislead the jury and should be refused." In *Spohn v. Railroad*, 87 Mo. 14, it is said "that an instruction should not be given which singles out one statement in evidence and directs a verdict on the truth of such evidence in disregard of the other evidence. Such instructions are dangerous and should not be given on any occasion."

Applying the rules here laid down it is quite clear that the trial court in this case erred in giving this

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instruction. It was not the province of the court to select certain facts shown by the evidence and tell the jury such was "all the law required as far as diligence on the part of plaintiff" was concerned, or that starting the car was "an act of negligence on the part of defendant and a breach of its duty to plaintiff as a passenger on its road." It was for the jury to determine from all the evidence in the case the question of diligence or negligence, and not for the court to determine that question by directing their attention to certain parts of the testimony and declaring the same negligence *per se*, as this instruction virtually does.

In view of the fact that the case will have to be retried, we may remark that we see no good reason why the court should not give defendant's instruction on the subject of accident or misadventure. *Sawyer v. Railroad*, 37 Mo. 241; 1 Thompson on Neg. 61, 338; 2 *Ibid.* 1234.

For the error in giving instruction number one in the form contained in the record, the judgment must be reversed and the cause remanded. So ordered. All concur.

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MATT CLARK, Respondent, v. D. R. DIFFENDERFER *et al.*, Appellants.

St. Louis Court of Appeals, May 22, 1888.

1. EVIDENCE—WRITTEN CONTRACT VARIED BY PAROL.—It is error to admit parol testimony to vary the terms of a written contract, when there is no ambiguity in the writing, and the contract is complete in itself.

2. PRACTICE—DEMURRER TO EVIDENCE.—Where the plaintiff sued for work done in second-class masonry, and the engineer, by whom, under the terms of the contract, the measurements and classifications were to be determined, testified that the plaintiff did no second-class masonry, the court ought to have sustained a demurrer to the evidence.

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APPEAL from the Laclede Circuit Court, HON. BEN. V. ALTON, Judge.

Reversed.

JAMES MORAN, for the appellants: It was manifest error in the court to allow parol evidence to go to the jury varying the terms of the written contract. *Shickle v. Chouteau*, 84 Mo. 161; *James v. Clough*, 20 Mo. App. 147; *Bartlett v. Weyman*, 14 Johns. 260; *Hanson v. Stetson*, 5 Pick. 506; 1 Greenl. Evid., sec. 275; 2 Stark. Evid. 544. The clause in the written contract, stating that "the measurement and classification to be the same as made by the chief engineer or his assistants," is the essence of the entire contract. The first instruction given by the court on behalf of plaintiff is misleading. It tells the jury that if the plaintiff "did second-class masonry, and that the engineer refused or neglected to make an estimate for such work, and that defendants were a party to such wrong," etc. There was no evidence introduced to support this proposition, and in submitting it to the jury the court committed error. *State ex rel. v. Faulkner*, 74 Mo. 607; *Bowen v. Railroad*, 75 Mo. 426, 437; *Utley v. Tolfree*, 77 Mo. 307, 508, 591; *Condow v. Railroad*, 78 Mo. 567; *Kinney v. Railroad*, 70 Mo. 253; *Bank v. Westlake*, 21 Mo. App. 565; *Elliot v. Welby*, 13 Mo. App. 19; *Kramn v. Faulkner*, 9 Mo. 34; *Conway v. Railroad*, 24 Mo. App. 235; *Muirhead v. Railroad*, 19 Mo. App. 634; *Chouteau v. Searcy*, 8 Mo. 734; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Bank v. Overall*, 16 Mo. App. 510; *Skyles v. Bollman*, 85 Mo. 35; *Musick v. Railroad*, 57 Mo. 134; *Bell v. Railroad*, 72 Mo. 50; *Biglow v. Carney*, 18 Mo. App. 534. The second instruction is erroneous in this, that it singles out the evidence of plaintiff, and tells the jury that if the plaintiff has shown that he did any second-class, etc. This language is calculated to direct the mind of the jury to the plaintiff's own testimony, and

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he swore that he did twenty-four yards of second-class masonry, and the jury excluded all other evidence, as they were warranted in doing under the second instruction, and found for plaintiff in the amount sworn to, viz., twenty-four yards. To give an instruction that would permit of this, is manifest error. *State v. Bailey*, 57 Mo. 131, 134; *Donohue v. Railroad*, 83 Mo. 560; *Chouteau v. Iron Works*, 82 Mo. 73; s. c., 12 Mo. App. 565; *Gray v. Parker*, 85 Mo. 107; *Raysdon v. Trumbo*, 52 Mo. 35; *Judd v. Railroad*, 53 Mo. 56; *Weil v. Swartz*, 21 Mo. App. 373, 110; *Clay v. Railroad*, 17 Mo. App. 629; *Ehrlich v. Ins. Co.*, 15 Mo. App. 579; *Jamison v. Carl*, 5 Mo. App. 598; *Seegrist v. Arnold*, 10 Mo. App. 197; *Hoffman v. Parry*, 23 Mo. App. 20; *Kendig v. Railroad*, 79 Mo. 207; *Pourcelly v. Lewis*, 8 Mo. App. 593; *Spohn v. Railroad*, 87 Mo. 74; *Chouteau v. Iron Works*, 83 Mo. 87; s. c., 12 Mo. App. 565. There was no evidence to support the verdict, and the court erred in refusing defendant's first instruction demurring to its sufficiency. *Spooner v. Railroad*, 23 Mo. App. 403; *Wright v. Railroad*, 20 Mo. App. 481; *Brewing Co. v. Bodeman*, 12 Mo. App. 572; *Taylor v. Fox*, 16 Mo. App. 527; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Railroad v. Vasburg*, 45 Ill. 311; *Kidwell v. Railroad*, 11 Gratt. 676; *Gas Co. v. City*, 46 Mo. 121; *Matthews v. Danahy*, 26 Mo. App. 660. The sole question at issue was, how much work had been done under the contract. The engineer swore that there was but 49.6 cubic yards of third-class masonry done by plaintiff, or by the firm of Diffenderfer & Company. This evidence is supported by estimates, and to permit the written contract made by plaintiff and defendants to be broken down by the parol evidence of plaintiff and his father, and thereby compel defendants to pay plaintiff two hundred and ninety-four dollars instead of one hundred and fifty dollars, the amount earned under the contract, would in effect state a doctrine that would compel contractors for work on railroad works to pay twice as much as they agreed to pay by the terms of the written contract.

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NIXON & MOORE, for the respondent.

PEERS, J., delivered the opinion of the court.

This cause was transferred to this court from the Supreme Court, pursuant to the provisions of an act of the General Assembly of the state of Missouri, approved March 4, 1885. Laws, 1885, p. 144.

The case originated before a justice of the peace in Laclede county and is based on an account for work done under a written contract. From the judgment of the justice the defendant appealed to the circuit court, where, in August, the plaintiff again having judgment, the defendants again appeal and bring the case here.

Quite a number of reasons are assigned why the judgment should be reversed, chief among which are: (1) Because the court erred in overruling defendants' demurrer to the evidence; (2) because the verdict of the jury is against the evidence adduced at the trial; (3) because the verdict is against the law as declared in the instructions given by the court; (4) because the court erred in refusing to give instructions asked by defendants; (5) because the court erred in permitting oral evidence to go to the jury to vary the terms of the written contract introduced in evidence and made between plaintiff and defendants.

The work here sued for was done under the following written agreement:

"This agreement made and entered into at Lebanon, Missouri, this fifteenth day of September, 1881, by and between Matt Clark, party of the first part, and Diffenderfer & Company, party of the second part. Witnesseth: That for and in consideration of the payments hereinafter mentioned, the party of the first part hereby covenants and agrees and binds himself strictly in accordance with the terms and stipulations of this agreement to perform certain work and labor, beginning at station one and ending at station five hundred and

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eighty-five of the Laclede & Fort Scott Railroad Company, under the direction of the said party of the second part, or any agent it may appoint, and subject to the chief engineer of said Laclede & Fort Scott Railroad Company, at the following prices per cubic yard of each material designated, to-wit: First-class masonry, nine dollars ($9.00) per cubic yard; second-class masonry, six dollars ($6.00) per cubic yard; third-class masonry, three dollars ($3.00) per cubic yard; paving slope wall or riprap, one and twenty-five hundredths dollars per cubic yard. Haul over one mile on masonry, thirty cents per cubic yard per mile after first mile. The measurements and classifications to be the same as made by the chief engineer of the Laclede & Fort Scott Railroad Company, or his assistants."

There was testimony tending strongly to show that under the contract the plaintiff had been paid for all the work he did. According to the estimate made by the chief engineer, upon this point, the witness, Walkinshaw testified: "Burlingame was chief engineer. Quigley succeeded him. This estimate of the engineer is the last and final estimate of work done by Diffenderfer & Company. I paid the hands for work done. I settled with Matt Clark (plaintiff) after the work was done. Matt Clark said he wanted to get his money, and never said anything about second-class masonry. He did not express any dissatisfaction at his pay. * * * At the time I settled with him he made no objections to the settlement. We paid in full the amount he claimed."

J. B. Quigley testified: "I measured and estimated all the work done by Diffenderfer & Company, and, as chief engineer, measured all the work done by the plaintiff. Said measurement was carefully done, and is correct, as rendered, in every particular, and that all the work done by Clark on said road is forty-nine and six-tenths yards of third-class masonry. He did not do any second-class masonry on said road for defendants. I conversed with plaintiff in regard to work done by

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him and he then was perfectly satisfied with the estimate and made no complaint, but on the contrary said it was correct in every particular."

Such being the testimony, as to the classifications and the measurements, under the written contract made by the parties, we are unable to discover upon what theory the plaintiff is entitled to recover at all. He sues for second-class masonry, and the engineer to whom he agreed in writing to leave the classification and measurement, says he did no second-class masonry, and was paid for all the third-class work he performed. The plaintiff is bound by his agreement, it is plain and direct. It describes the work, specifies the pay, and directs the measurement and classification.

We think the court erred in permitting the plaintiff to offer parol evidence varying the terms of the written contract. There was no such ambiguity in the contract as called for parol explanation, nor is the contract in itself incomplete in its terms. *James v. Clough*, 25 Mo. App. 147; *Shickle v. Chouteau*, 10 Mo. App. 241.

But aside from this question and independent of the error complained of in giving and refusing instructions, we are at a loss to understand upon what theory the court sent the case to the jury. There was no testimony to justify it, and the demurrer to the evidence ought to have been sustained.

It follows, then, that the judgment of the lower court must be reversed. The other judges concurring, it is so ordered.

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HENRIETTA WIENER, Respondent, v. EBER PEACOCK, Administrator, Appellant.

St. Louis Court of Appeals, May 22, 1888.

1. **PRACTICE—SURVIVAL OF ACTION.—An action under Revised Statutes, sections 3311, 3312, for failure by a trustee, mortgagee, or beneficiary to acknowledge satisfaction in the manner required, after demand made therefor upon payment of the debt, survives, after the death of such trustee, mortgagee, or beneficiary, against his legal representatives.**

2. **PROMISSORY NOTE—RENEWAL—CONTINUING SECURITY—INSTRUCTION.—A promissory note given in renewal of another note which is secured by deed of trust, is secured in like manner by the deed, until the debt becomes satisfied. Hence, where a second note is given upon the maturity of the first, for a like amount, and the payee is afterwards found to be in possession of both notes, it is not material how the mere fact of his possession came about; and it is error to instruct that, unless it appear from the evidence that the first note was retained by the payee with the knowledge and consent of the debtor, the trust debt must be considered as discharged, and the creditor will be liable for failure to acknowledge satisfaction, as required by the statute.**

3. **PRACTICE—SPECIAL DEFENCE.—Matters of excuse or justification for a failure to acknowledge satisfaction of a trust deed or mortgage, when required by the statute, must be specially pleaded, and cannot be proved under a general denial.**

APPEAL from the St. Louis Circuit Court, HON. GEORGE W. LUBKE, Judge.

Reversed and remanded.

KERR & TITTMANN, for the appellant: The penalty or forfeiture sued for abated by the death of Dr. Rose. An action for the recovery of the statutory penalty under sections 3311 and 3312, Revised Statutes, is a penal action. 2 Jones on Mortgages [2 Ed.] sec. 990; *Stone v. Lannon*, 6 Wis. 497. An action for a penalty or forfeiture created by statute does not survive. *Bank v. Collins*, 5 Hun, 209; *Stakes v. Stickney*,

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96 N. Y. 323; *McBratney v. Railroad*, 17 Hun, 389; *Little v. Conant*, 2 Pick. 527; *O'Donnell v. Seybert*, 13 Serg. & R. 54; *People v. Tioga C. P.*, 19 Wend. 76, 77; *Wade v. Kalbfleisch*, 52 N. Y. 287; *Johnson v. Elwood*, 82 N. Y. 362; *Hegerich v. Keddie*, 99 N. Y. 258, 262; *Snyder v. Railroad*, 86 Mo. 617. The subject is well illustrated in the various cases which hold that an action for breach of promise of marriage does not survive. *Stebbins v. Palmer*, 1 Pick. 171; *Smith v. Sherman*, 4 Cush. 408; *Kelley v. Riley*, 106 Mass. 339; *Wade v. Kalbfleisch*, 52 N. Y. 282; *Hayden v. Vreeland*, 37 N. J. Law (8 Vroom), 372; 3 Williams on Executors [6 Am. Ed.] 1728, 1830; Schouler's Executors and Administrators, sec. 370; *Higgins v. McNally's Adm'r*, 9 Mo. 494; *Jewett v. Weaver, Adm'r*, 10 Mo. 234; *Froust v. Bruton, Adm'r*, 15 Mo. 619; *Stanley v. Vogel*, 9 Mo. App. 98; s. c., 78 Mo. 245; *Town v. Rhomberg*, 78 Mo. 547, 549. The note of July 27, 1881, is either a renewal of the note of July 27, 1880, or the latter was reissued and redelivered as collateral to the former. In neither case is the plaintiff entitled to a release of the deed of trust. *Leppold v. Held*, 58 Mo. 213; *Christian v. Newberry*, 61 Mo. 446; *Darst v. Gale*, 83 Ill. 137, 142. Upon the undisputed facts of the case, Dr. Rose was not liable to a penalty for failing to release the deed of trust. He had substantial grounds for so refusing, and honestly entertained the opinion that his unpaid note was secured by the deed of trust. Plaintiff, too, was estopped from asserting the contrary. 2 Jones on Mortgages [2 Ed.] sec. 991; *Burrows v. Bangs*, 34 Mich. 304; *Haubert v. Haworth*, 9 Phila. 123; *Marvin v. Vedder*, 5 Cowen, 674.

KLEIN & FISSE, for the respondent: The action against Dr. Edward Rose did not abate by his death, because the action itself survived or continued. Rev. Stat., secs. 96, 97, 3663; *Higgins v. Breen*, 9 Mo. 497; *James v. Christy*, 18 Mo. 162; *Baker v. Crandall*, 78 Mo. 584; Bliss on Code

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Pleadings [2 Ed.] secs. 39, 43. The words of the statute embrace every wrong done to the property, rights, or interests of another; these are to be considered disjunctively, and to include all wrongs whereby the aggrieved party is injured, except those named and excepted in section ninety-seven. *Haight v. Hayt*, 19 N. Y. 464. There was no evidence that the note of July 27, 1881, was a renewal of the note of July 27, 1880, which was paid at maturity. The instructions given by the court put the case fairly to the jury upon the evidence adduced. The evidence showed conclusively that the note of July 27, 1880, was paid July 27, 1881, and that Dr. Edward Rose received the money. He nevertheless claimed a right to hold this note as against the plaintiff and her property. It is plain that to give him such right he must show some act on her part. The answer of the defendant was a general denial. If Dr. Rose had any substantial ground for refusing to enter satisfaction of the deed of trust, other than the one that the note had not been paid, this would be matter of affirmative defence. 2 Jones on Mortgages [3 Ed.] sec. 991.

ROMBAUER, P. J., delivered the opinion of the court.

Our statute provides that if any mortgagee, trustee, or *cestui que trust*, his executor, administrator, or assignee, receive full satisfaction of any mortgage or deed of trust, and do not within thirty days after request and tender of cost acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent. on the amount of mortgage or deed of trust money, absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction. Rev. Stat., secs. 3311, 3312.

In July, 1880, the plaintiff, then the wife of Hermann Wiener, held as her separate estate a lot in the city of

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St. Louis, the legal title whereof was vested in her husband subject to her written direction under seal as to its disposal by him in any manner, and being so possessed, at said date conjointly with her husband executed a deed of trust conveying the premises to one Hammel as trustee to secure the payment of two principal notes, one for one thousand dollars, payable one year after date, and one for four thousand dollars, payable three years after date, and also interest notes; all of which notes prior to their maturity came into possession of the defendant's decedent, Edward Rose, and all of which were paid to him at their respective maturities, or shortly thereafter.

In July, 1881, and three days prior to the maturity of the one thousand dollar note herein mentioned the plaintiff and her husband executed, endorsed, and delivered to Edward Rose another note for one thousand dollars, being a duplicate of the note mentioned in the deed of trust in every respect, except that it bore date July 27, 1881, and was payable to their own order, whereas the original note bore date July 27, 1880, and was payable to one Krekeler, from whom the decedent acquired it. The original note of one thousand dollars was also either retained by Rose after its payment, or else if it came into the possession of the makers was redelivered to him; but whether one or the other, or whether if redelivered, it was done by the consent of plaintiff, rests upon mere surmise.

In May, 1886, Hermann Wiener, being then dead, and all the notes secured by the deed of trust paid as above stated, the plaintiff, through her agent, demanded of Rose a release of the deed of trust, tendering the statutory fee. Rose refused to make the release, claiming that the original note of one thousand dollars was still held by him as collateral security for the note of a corresponding amount bearing date July 27, 1881, and plaintiff was entitled to no release until said note had been fully paid. Plaintiff thereupon instituted this suit

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to recover from him the statutory penalty under section 3312, above recited. Rose died during the pendency of the suit, and his administrator being substituted, the plaintiff recovered against the latter under the instructions of the court a judgment for five hundred dollars and costs, from which the administrator prosecutes this appeal.

The defendant's exceptions may be briefly stated as follows: (1) That the court erred in not instructing the jury as requested, that the penalty sued for abated by the death of Rose; (2) that the note of July 27, 1881, was either a renewal, or accompanied with a reissue of the one of July 27, 1880, and plaintiff is not entitled to a satisfaction of the deed in either event; (3) that the court's instruction as to the burden of proof whether the note was reissued with plaintiff's consent was erroneous; (4) that upon the undisputed facts the defendant was liable to no penalty, having substantial grounds to believe that the one thousand dollar note was still a subsisting lien upon the land.

I.

Our statute (Rev. Stat., sec. 96) provides: "For all wrongs done to the property, rights, and interests of another for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and after his death against his executor or administrator in the same manner and with the like effect in all respects as actions founded upon contracts."

Section 97: "The preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

The defendant contends that in one sense the statute

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is not broader than the statute of 3 Edw'd III., and that even under our statute an action for such torts only survives, from which the decedent or his estate has derived some pecuniary benefit. This view derives countenance from the decisions in New York, from the statutes of which ours is apparently taken. In *Hegerich v. Keddie*, 99 N. Y. 263, RUGER, C. J., in construing the statute, says: "The language and structure of these sections would seem to repel the idea that the exceptions provided by the second section were intended to authorize the survival of all other actions for torts. * * * Such construction gives the first section no office to perform, and the courts have practically rejected this interpretation in numerous cases, holding that causes of action abated by death which were not named in the second section." Our courts, however, have not followed that view. In *Higgins v. Breen*, 9 Mo. 499, where the statute was first construed, the court held: "Our statute has changed the English law in this respect, and has given an action both to and against executors and administrators, and by employing much broader language than the statute of Edward, seems to have included by express enactment the injuries which were comprehended in that statute only by construction. The words of our statute are 'for wrongs done to the property, rights, or interests of another,' etc., *with an exception* of actions for slander, libel, assault and battery, or false imprisonment, and to actions of the case for injuries to the person." This seems to recognize that the court construes the second section as providing the only exceptions in which actions of tort do not survive. This interpretation is adopted in *Baker v. Crandall*, 78 Mo. 589, where the language used in *Higgins v. Breen*, is approvingly quoted. The cases of *Stanley v. Bircher's Executor*, 78 Mo. 245, and *Town of Carollton v. Rhomberg*, 78 Mo. 547, do not militate against this view, as the first was an action for injury to the person, and as such within the exception of section ninety-seven, and the second, though a civil

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action in form, *quasi*-criminal in its nature, being a prosecution for the violation of a city ordinance.

It cannot be doubted that an injury caused by the failure to release an incumbrance upon request is an injury to the property and not to the person. That such release shall be made is provided by express contract between the parties, and the mortgageor would have an action regardless of the statute. The statute fixes the general damages only, and liquidates them where no special damages can be shown. It provides for a forfeiture of ten per centum absolutely, as well as for a forfeiture of "any other damages" the mortgagee may be enabled to prove, thus impliedly recognizing the ten per centum as general liquidated damages. In *Edwards v. Brown*, 67 Mo. 377, which was an action on a statutory dram-shop keeper's bond, the statute providing that the dram-shop keeper should not sell to the minor, without the written consent of the parent, intoxicating liquors, and if he did so, he should *forfeit* and pay to such parent for every offence fifty dollars, it was held that the action was neither *qui-tam* nor *quasi-criminal*, but for damages sustained by the plaintiff liquidated by the statute. We think the court was right in holding that the cause of action was one which under the statute survived against the administrator.

II. & III.

A mortgage being given as security for a debt and not merely as security for any particular evidence of a debt, the general rule is that no mere change in the mode and time of payment, nothing short of actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt and by the terms of the contract nothing but payment avoids it. *Lippold v. Held*, 58 Mo. 213, 216. Thus, where A gave B a bond bearing six per cent. interest, secured by a deed of trust on a slave, and afterwards, without intending to abandon his lien on the slave, B took

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from A a new bond bearing ten per cent. interest, and surrendered the old bond, it was held that by this act B did not lose his lien on the slave, but that the slave was only subject to a lien for the amount of the old bond with six per cent. interest. *McDonald v. Hulse*, 16 Mo. 503.

Keeping in view the proposition of law thus adjudged, we must conclude that the court committed an error prejudicial to the defendant by giving, upon request of plaintiff, the following instruction:

"Even if the jury believe from the evidence that, after the payment of the note for one thousand dollars, read in evidence and dated July 27, 1880, and payable one year after date, and secured by the deed of trust read in evidence, the said note came again into the possession of said Dr. Edward Rose, as collateral security for another note signed by the same parties, yet unless the same was delivered to him as such collateral by or with the knowledge and consent of the plaintiff, the plaintiff is entitled to recover, provided that the jury find from the evidence that after said note was paid the said Dr. Rose was requested, on behalf of plaintiff, to acknowledge satisfaction of said deed of trust, and the cost of such acknowledgment was tendered to him, and the burden of proving that said note was redelivered as collateral to said Dr. Rose, with the knowledge and consent of this plaintiff, is on the defendant. By burden of proof is meant that the evidence and circumstances shown in evidence, and the inferences fairly to be drawn from such circumstances tending to establish the fact that the said note was so redelivered as collateral to Dr. Rose, with the knowledge and consent of the plaintiff, are of greater weight than the evidence and circumstances shown in evidence, and the inferences fairly to be drawn therefrom, which tend to support the contrary of said proposition."

This instruction made plaintiff's right of recovery dependent on the fact that the original mortgage note of one thousand dollars was redelivered to Rose as collateral

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security for the note of the same tenor and amount bearing date July 27, 1881, with the knowledge and consent of plaintiff. The testimony concedes that the note of July 27, 1881, remains unpaid, and under the uncontroverted evidence it is more than probable that it was a mere renewal of the original mortgage note for that amount. If so, it was wholly immaterial, as between the parties themselves, whether the original note was reissued with the consent of plaintiff, or whether it was reissued at all. The debt being simply renewed and not paid kept the lien alive for the security of the debt, as between the contracting parties, regardless of the fact what became of the original evidence of the debt. The cases above referred to admit of no other construction.

IV.

We deem it unnecessary to express an opinion on defendant's fourth point, since his answer is a mere general denial, and matters of excuse or justification of refusal to enter satisfaction, it would seem, should be especially pleaded. Jones on Mortgages, sec. 991.

As it is clear that the case was submitted to the jury on an erroneous theory, which, under the facts of the case, was prejudicial to the defendant, the judgment will be reversed and the cause remanded. So ordered. All concur.

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SEBASTIAN ALBERT, Appellant, v. WENDELL SEILER, Respondent.

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St. Louis Court of Appeals, May 22, 1888.

1. PRACTICE, APPELLATE—MOTION FOR NEW TRIAL.—Objections to the exclusion of evidence will not be considered on appeal, when they were not presented below in the motion for a new trial.

2. PRACTICE—INSTRUCTIONS.—Instructions are properly refused when not justified by the evidence.

3. PRACTICE—CONFLICTING EVIDENCE.—Where the evidence is conflicting and there is substantial testimony in support of the verdict, the trial court commits no error in refusing a new trial.

4. PRACTICE, APPELLATE—INSTRUCTIONS.—An objection that the verdict was against the instructions for the plaintiff is entitled to no consideration when the record fails to show that any instructions were given for the plaintiff.

5. PRACTICE—MOTION FOR NEW TRIAL—SURPRISE.—A motion for a new trial on the ground of surprise is properly denied when it appears that the new testimony proposed to meet the alleged surprise is merely cumulative. Nor can a party avail himself of an alleged surprise at the trial when he did not, at the time of its occurrence, make the fact known and take such steps as were possible to counteract its effects.

APPEAL from the Bollinger Circuit Court, HON. JAMES D. FOX, Judge.

Affirmed.

SAM. M. GREEN, for the appellant: The instructions numbered one to six prayed by plaintiff were improperly refused. Taken in their entirety, they fairly presented the law of the whole case, were clear and confined to the contract sued on, and were based on the evidence adduced at the trial. *Talbot v. Means*, 21 Mo. 427; *Thomas v. Babb*, 45 Mo. 384; *McKeon v. Railroad*, 43 Mo. 405; *Glass v. Gelvin*, 80 Mo. 297; *Livingston v. Ins. Co.*, 7 Cranch. 506. 544; *Jarret v. Morton*,

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44 Mo. 275; *Mellon v. Smith*, 65 Mo. 315; Story on Contracts [3 Ed.] sec. 844*a*; 2 Parsons on Contracts [6 Ed.] sec. 679. Even in a case of fraud, which is neither charged nor proved in this case, the parties must be placed in *statu quo*. *Cahn v. Reed*, 18 Mo. 116; *Pearsel v. Chapin*, 44 Pa. St. 9; *Estes v. Reynolds*, 75 Mo. 563. There was no time named in contract; if agreed on, it should have been incorporated in it. *Smith v. Shell*, 82 Mo. 215. And there was no proof of any modification of the contract on a new consideration which would be necessary to authorize instructions on specific articles and time. *Henning v. Ins. Co.*, 47 Mo. 425. A written contract supersedes a prior verbal agreement concerning the same matter. *Hager v. Hager*, 71 Mo. 610; *Chrisman v. Hodges*, 75 Mo. 413. Instructions numbered two and three given by the court for plaintiff, as well as those given for defendant numbered one, three, four, five, and seven, are objectionable for the same reasons, and tend to confuse the jury as to time of delivery, not mentioned in contract, and notes not admitted in evidence; and are inconsistent with instructions as a whole. *Donahoe v. Railroad*, 83 Mo. 560; *Chouteau v. Iron Co.*, 82 Mo. 73; *Greer v. Parker*, 85 Mo. 107. The other instructions, numbered two and eight, given for defendant should not have been given, because, in effect, they make a contract for the parties which they never made. The rule is, that when a written contract is made, everything is incorporated therein. *Hager v. Hager*, 71 Mo. 610; *Chrisman v. Hodges*, 75 Mo. 413. These instructions confined the case within certain limits and are inconsistent with others given. They should be predicated on the whole evidence. *Mansur v. Botts*, 30 Mo. 657; *Sheedy v. Streeter*, 70 Mo. 679. Instructions should be clear and consistent as a whole, otherwise they are calculated to mislead. One instruction cannot cure the defects in another. *Henschen v. O'Bannon*, 56 Mo. 280; *Price v. Railroad*, 77 Mo. 508; *Lampert v. Gas Co.*, 12 Mo. App. 576; *Stevenson v.*

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Hancock, 72 Mo. 612. Contradictory instructions multiply the evils in both and correct neither. *State v. Nauert*, 2 Mo. App. 295. An erroneous instruction is not cured by one given to the other party. *Goetz v. Railroad*, 50 Mo. 472. These instructions were clearly repugnant and were error. *Frederick v. Allgaier*, 88 Mo. 598. These instructions singled out particular facts (governors, pump, lower first joint, belting, concave, new straw carrier) which were not conclusive by the evidence, nor shown to be in the contract, and emphasized them, which was manifest error. *Koenig v. Life Association*, 3 Mo. App. 596; *Siegrist v. Arnot*, 10 Mo. App. 197; *Kendig v. Railroad*, 79 Mo. 207; *Jamison v. Carroll*, 5 Mo. App. 598; *Ehrlich v. Ins. Co.*, 15 Mo. App. 579; *Clay v. Railroad*, 17 Mo. App. 629; *Schaefer v. Leahy*, 21 Mo. App. 110; *Weil v. Schwartz*, 21 Mo. App. 372; *Judd v. Railroad*, 53 Mo. 56; *Hackman v. Maguire*, 20 Mo. App. 286. The motion for a new trial complied with the requirements of the statute. Rev. Stat., sec. 3704. The weight of the evidence was greatly against the verdict, and, in view of the conflicting instructions, leads to the conviction that there were prejudice and gross ignorance on the part of the jury. *Taylor v. Fox*, 16 Mo. App. 527; *Lionberger v. Pohlman*, 16 Mo. App. 392. The evidence made a clear case for plaintiff, and a new trial should have been awarded. *Borgraefe v. Knights of Honor*, 22 Mo. App. 127. The newly-discovered evidence was not cumulative, but material, and would have changed the result. If material, a new trial should have been given. *State v. Locke*, 58 Mo. 107; 26 Mo. 603. The surprise was as to facts. There was no element of neglect, as to the last moment the plaintiff was expected to arrive, but was sick and could not come. His testimony was necessary in addition to his deposition.

J. W. LIMBAUGH, for the respondents: The court properly refused the instructions asked by appellant. Appellant's instructions numbered one and two are based

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upon the theory that the property in the machinery passed to respondents on the execution of the contract. Such is not the law as applicable to this case. The property does not pass absolutely unless the sale be completed, and it is not completed until the happening of any event expressly provided for, or so long as anything remains to be done to the thing sold to put it in a condition for delivery, or in a deliverable state. 1 Parsons Cont. [6 Ed.] 527; Benjamin on Sales [2 Am. Ed.] secs. 311, 318, 319, 320, 335; *Lingham v. Eggleston*, 27 Mich. 324; *S. T. & C. P. Co. v. Stannard*, 44 Mo. 71; *Ober v. Carson*, 62 Mo. 209. There was no error in refusing instructions numbered three and five on the part of appellant. The abstract legal propositions stated therein are not applicable to the facts in this case. *Longuemore v. Busby*, 56 Mo. 540; *Shaffner v. Leahy*, 21 Mo. App. 110. The fourth instruction asked by appellant is not the law of the case. Unless he first shows performance of all the conditions precedent on his part he is not entitled to recover, and the amount of his expenditures of money in repairs is immaterial, and can form no basis of damages, unless he has put the property in a condition in which, under the terms of the contract, it was the duty of respondents to accept it. *Monks v. Miller*, 13 Mo. App. 363; *Turner v. Mellier*, 59 Mo. 526; *Larimore v. Tyler*, 88 Mo. 661. There was no evidence to base the sixth instruction on, and it was righlty refused. *Givens v. Van Studiford*, 4 Mo. App. 499; *Willis v. Stephens*, 24 Mo. App. 494. When a contract contains various mutual stipulations, neither party can recover for a breach of a covenant in his favor without proving the performance of all acts, on his part, which by the contract are conditions precedent to the obligation of defendant. *Drury v. Kile*, 16 Mo. 450; *Eyerman v. Cem. Ass'n*, 61 Mo. 489; *Yates v. Ballentine*, 56 Mo. 530; *Turner v. Mellier*, 59 Mo. 526; 2 Parsons Cont. [6 Ed.] 520, 532; Benjamin on Sales [2 Am. Ed.] sec. 318; *Lewis v. Ins. Co.*, 61 Mo. 534; *Haynes v. Church*, 12 Mo. App. 536. Respondents'

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instruction number five correctly declares the law as shown by authorities hereinbefore cited. 1 Parsons Cont. [6 Ed.] 527; Benjamin on Sales [2 Am. Ed.] secs. 311, 318, 319, 320, 335; *Lingham v. Egglestone*, 27 Mich. 324; *Ober v. Carson*, 62 Mo. 209; *S. F. & C. P. Co. v. Stannard*, 44 Mo. 71. Respondents' instruction number six is a statement of an elementary proposition of law, and has so long been supported in this state that it would seem superfluous to cite authorities; but see, *Davis v. Railroad*, 13 Mo. App. 449; *Berry v. Wilson*, 64 Mo. 164; *Cooper v. Johnson*, 81 Mo. 513. The allegation of the discovery of new evidence is not supported by affidavit, and should not be considered. *State v. McLaughlin*, 27 Mo. 111; *Culbertson v. Hill*, 87 Mo. 553. The evidence alleged to be discovered is only cumulative and is no ground for a new trial. *Roach v. Colburn*, 76 Mo. 653; *Snyder v. Burnham*, 77 Mo. 52; *Culbertson v. Hill*, 87 Mo. 553; *Stone v. Spencer*, 77 Mo. 356. In this matter appellant has not complied with the requirements of the law, and his application was rightly overruled. *Shaw v. Busch*, 58 Mo. 107; *Cook v. Railroad*, 56 Mo. 380; *Boggs v. Lynch*, 22 Mo. 563. The deposition of appellant was taken after the filing of the petition and answer on which the case was tried. Albert then knew the issues in the suit and was competent to testify as to the facts involved therein. His failure to testify to the whole case as made by the pleadings cannot now be urged as ground for new trial nor for error. Neither can he now be permitted to say he was surprised at the testimony of respondents. Their testimony was in support of their answer, and could not be a surprise to appellant. "A party cannot be surprised, in its legal meaning, that his adversary introduced testimony in support of the issues made by the pleadings. The general rule is that each party must understand his case and come prepared to meet the case made by his adversary." *Bragg v. City*, 17 Mo. App. 221; *Workman v. Taylor*, 27 Mo. App. 550. Plaintiff should

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have taken a nonsuit and sued again, or asked postponement till he could produce countervailing proof. *Savoni v. Brashear*, 46 Mo. 345; *Bragg v. City*, 17 Mo. App. 221. The trial court in its sound discretion determined the motion for new trial in favor of defendants. This court will not interfere with the action of the lower court. *Eidelmiller v. Kump*, 61 Mo 340; *Cook v. Railroad*, 56 Mo. 380. The questions of fact in this case were submitted to a jury and by them under the evidence adduced, were determined in favor of defendants. This court will not disturb such finding when there is any evidence to support it. *Faugman v. Husey*, 43 Mo. 122; *Longuemore v. Busby*, 56 Mo. 540; *Norton v. Moberly*, 18 Mo. App. 457; *Foundry v. McCann*, 68 Mo. 195.

PEERS, J., delivered the opinion of the court.

This action was commenced in the Cape Girardeau court of common pleas in September, 1884, upon the following written instrument:

"Cape Girardeau, Mo., July 16, 1884. We have this day bought of S. Albert, Cape Girardeau, Missouri, one second-hand Garr, Scott & Company separator, which Mr. S. Albert agrees to put in good running order and furnishes whatever is necessary to do the necessary work, warranting the same. We agree to pay him for said engine and separator the sum of seven hundred dollars as follows: Our notes payable October 1, '84, and October, '85, for three hundred and fifty dollars each.

"(Signed) "WENDELL SEILER,
"JOHN M. DEVORE."

For a breach of said writing obligatory plaintiff charges that defendants wholly failed, neglected, and refused to execute and deliver to plaintiff their promissory notes as in said agreement mentioned, or pay the purchase price of said machinery or any part thereof, and that by reason of their refusal to comply with their agreement, plaintiff has been damaged in the sum of one thousand dollars.

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In their answer the defendants admit the execution of the instrument set out in plaintiff's second amended petition; they deny that the plaintiff performed the conditions, acts, and agreements by him agreed and contracted to be performed and done in and about said engine and separator; and they aver and say that plaintiff did not put said engine and separator in good running order and repair as by said agreement he bound himself to do; and as it was contracted should be by him done before defendants should be compelled to accept said engine and separator.

"Further answering say that at the time they signed and delivered said instrument of writing to plaintiff, he agreed and contracted with defendants that, previous to the delivery of said machinery to defendants and their acceptance of the same, he should put new governors, a new pump, and a new lower or first joint of pipe on said engine; and, that he would furnish new belting, a new straw carrier, and a new set of teeth for said separator, attach and adjust the same thereto and put said engine and separator in good running order; that plaintiff failed and refused to furnish said repairs to said engine and separator; and by reason of said engine and separator not being repaired at the time fixed for the delivery thereof to defendants, and of plaintiff's then refusing to make or furnish said repairs, defendants refused to accept said engine and separator.

"For other and further answer defendants say that at the time appointed and agreed upon by plaintiff, for the delivery of said engine and separator to defendants, they called for them at the place where the same were to be delivered to them, and were ready and willing to accept said engine and separator according to the terms of said contract, and to execute their notes therefor; but that plaintiff had not then put said engine and separator in good running order; that he then and there refused to put them in good running order; and by

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reason of plaintiff's refusal to do and perform the conditions on his part aforesaid, defendants refused to accept said engine and separator; that said engine and separator were much out of repair and were unfit to use in threshing grain, the purpose for which defendants desired to buy them, and of which purpose plaintiff knew when he made the said contract with defendants; and that in the condition in which plaintiff offered to deliver said engine and separator, they were entirely useless to defendants.

"Further answering, say that they made the contract for the purchase of said engine and separator intending to use them in threshing wheat during the threshing season of 1884, for themselves and such farmers as might wish to employ defendants to thresh for them; that plaintiff knew this at the time for them to use said engine and separator, wherefore defendants pray judgment."

Plaintiff to this answer filed his replication. The venue of the case was thereupon changed to the circuit court of Bollinger county by consent, where in March, 1885, the case was tried by a jury, which resulted in a verdict and judgment for defendants, to reverse which the plaintiff appeals to this court, assigning as error: (1) The verdict of the jury was against the evidence at the trial; (2) the verdict was against the weight of evidence; (3) the verdict was against the instructions given by the court for the plaintiff; (4) material mistakes by defendants, who were sworn as witnesses in their own behalf, and (5) newly-discovered evidence, and surprise at the evidence offered by defendants.

Considerable time is expended by plaintiff in discussing in his brief the exclusion of evidence, but as the question was not properly saved in the motion for a new trial it will not be considered by this court. The motion for new trial does set out several grounds or reasons, not one of which could be held to include the objection that evidence was improperly excluded. The motion for new trial must *specify* the grounds upon which it is

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founded. *Bollinger v. Carrier*, 79 Mo. 318. Such objection was not called to the attention of the trial court by the plaintiff in his motion for new trial, and cannot be urged in this court. *Putnam v. Railroad*, 22 Mo. App. 589.

As to the action of the court in refusing the instructions offered by the plaintiff, we need only remark that they were not justified by the evidence, and the trial court committed no error in refusing them.

There was in this case some conflict of evidence, but upon a careful reading of all the testimony we are not prepared to say that the verdict is without proof to support it. On the contrary there is substantial evidence to support the verdict, and where such is the case, the trial court commits no error in refusing to grant a new trial upon the evidence. *Coudy v. Railroad*, 13 Mo. App. 588; s. c., affirmed, 85 Mo. 79.

On the part of the defendants, Devore, Seiler, Lancaster, and Frey, all testify that the machinery was not in good condition on July 22, 1884, the day on which Albert offered to deliver it. Frey and Lancaster, both practical engineers, testify not only that the machinery was not in good condition, but that it was unsafe and dangerous. Lancaster says: "Could not put water in the boiler when steam was over forty-five degrees. Valves of pumps were old and rusty and worn out; they had no connection with the boiler; they were stuck on to stop a leak, and were in no condition for use. The governors were heavy. Lower joint of smoke-stack was worn out. The engine made thirty revolutions per minute; it takes one hundred and forty to thresh. No new teeth in cylinder. Bassett agreed to repair the pump. The brakes were not on and were necessary. I have been engineer about twenty years."

Frey testified: "Am machinist twenty years. Saw engine; had Hancock inspirator. The boss mechanic screwed up the nipple one-half to one inch and it leaked. He picked up some pump-packing and wrapped it. I thought it would blow out. It would not work if

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steam was high. This was two o'clock on Tuesday, the last day I was there. The smokestack was an old one, bottom section full of holes; this checked the draft. No danger in the bottom joint. The engine was not in good repair with that smokestack. There was a piece of an old pump on it, in no repair to use the way it was; there were no connecting pipes. It probably would have worked if connected. I noticed the governors first day had no belt. Next day running at speed of thirty or forty revolutions. Governors did not handle engine. No brakes on engine; were necessary."

The above extracts from the testimony certainly warranted the trial court in refusing to sustain the motion for a new trial on the theory that the verdict of the jury was against the evidence. Nor do we see that the verdict was against the instructions given by the court for the plaintiff, especially in view of the fact that the record utterly fails to show that any instructions were given by the court for the plaintiff. All the instructions were given by the court of its own motion, and on behalf of defendants, but none whatever on behalf of the plaintiff. And as no question is properly raised as to the instructions thus given, we shall not examine them, further than to say, on the whole, they seem to have put the case before the jury in a very fair light.

Upon the question of surprise, we think that the affidavit of Sanders furnishes no ground for a new trial. His testimony would be merely cumulative. He says these defendants asked him "about the engine, and that he said it was a good one; that he had no difficulty in threshing wheat with it, though the governors were heavy; never said that a new pump was necessary, nor a new smokestack," etc., etc. Had this witness been produced at the trial, his testimony, as shown by the affidavit, would only differ from that of defendants as to the governors of the engine, and this point was amply covered by testimony other than that of defendants.

The affidavit of Mr. Albert that, "he was sick on the day of trial, and was unable to attend, and that he

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fully expected to be at the trial," does not furnish any ground for setting aside the verdict, especially in view of the fact that Mr. Albert was the plaintiff and testified by deposition to about the same facts as are contained in the motion for new trial.

"The general rule is, that each party must understand his case, and come prepared to meet the case made by his adversary. Therefore, a party cannot be surprised that his adversary introduces testimony in support of the issues made by the pleadings, even though such testimony is false." Haynes New Trials, par. 79.

Counsel, at the time, did not profess any surprise at the testimony, or protest to the court that they were not prepared to immediately meet it, or ask any delay to call witnesses thereto. The surprise never manifested itself until after the verdict of the jury.

In *Bragg v. City of Moberly*, 17 Mo. App. 221, this question is treated by PHILIPS, P. J., in the following language: "If a party be surprised by an unforeseen occurrence at the trial, he should make his misfortune known to the court instantly, and ask for a reasonable postponement to enable him to produce the conntervailing proof. 'If he can relieve himself from his embarrassment by any mode, either by a nonsuit, or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief.'" *Shellhouse v. Ball*, 29 Cal. 608; *Delmas v. Martin*, 39 Cal. 558.

Following the rule thus laid down, we think the trial court committed no error in the case, and its judgment is affirmed. All concur.

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E. D. LINDERSMITH *et al.*, Respondents, v. SOUTH MISSOURI LAND COMPANY, Appellant.

St. Louis Court of Appeals, May 22, 1888.

CONTRACT—SETTLEMENT.—The plaintiffs contracted to make and furnish railroad ties out of timber belonging to the defendant, and were to be paid a fixed price for such as were accepted by a designated inspector. Nothing was said about any payment for "culls," meaning such ties as should not be so accepted. The parties settled in full for the accepted ties at the end of each month, and a final settlement and payment in full were made at the end of all their transactions. But the plaintiffs never at any time demanded payment for culls, until the institution of the present suit, in which they claim compensation for the culls made by them and left upon the ground. *Held*, that nothing appears upon which the plaintiffs have a right of action.

APPEAL from the Howell Circuit Court, HON. J. F. HALE, Judge.

Reversed.

OLDEN & GREEN, for the appellant: "Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes every man undertakes to perform." Bouvier. "The law never implies what the parties never intended; never raises a promise when the evidence shows the parties intended none." *Bank v. Aull*, 80 Mo. 199. In the case of *Pickel v. St. Louis Chamber of Commerce Association*, 10 Mo. App. 191, THOMPSON, J., says: "That when parties have mutual matters of account between them, growing out of a contract, deliberately account together and state a balance, and the party who, on such accounting, is found indebted to the other, pays the debt or gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be re-opened or gone into, either at law or in equity, except upon

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clear proof of fraud, or mistake, or of an express understanding that certain matters were left open for future adjustment." LEWIS, P. J., of this court says: The opinion of this court in *Pickel v. Chamber of Commerce*, 10 Mo. App. 191, is conclusive against the attacking of such settlement, "except upon clear proof of fraud or mistake, or of an express understanding that certain matters were left open for future adjustment." *Buffington v. Land Company*, 25 Mo. App. 492. "In ordinary cases where the action is one at law, this court will not interfere in regard to questions of the mere weight of evidence, but it will interfere where the verdict is clearly against the evidence." *Garrett v. Greenwell*, 92 Mo. 120.

JOHN H. WINNINGHAM, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This action was brought before a justice of the peace to recover the reasonable value of three hundred and fifty railroad ties, alleged to have been made for the defendant, which reasonable value is alleged to be seventy dollars.

The evidence adduced at the trial, as preserved in the bill of exceptions, was as follows:

J. H. Moreledge, one of the plaintiffs, testified: "Myself and Lindersmith, the plaintiff in this suit, had a contract with the South Missouri Land Company to get out ties. We worked and got them, but each delivered them separately and got paid separately. We were to deliver ties and have our inspections each week, and were to get this weekly pay out of the company store for as much as we wanted in that way, and then what was due us at the end of each month we were to have in cash. We were to make standard ties, and were to have twenty cents apiece for them, and were to deliver them at different points along the railroad on the right of way. It was agreed that Ira Alexander should inspect the ties and receive them. They received them and hauled

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them off, and the ties that we have sued for have not been paid for."

On cross-examination, the same witness said: "The ties we have sued for are what Alexander inspected and marked as *cull ties*. I am an experienced tie-maker, and the rule is, when we get pay for cull ties, we get some places ten cents, and some places one-third the price of good ties. The ties sued for are, many of them, bad ties, and were properly marked as cull ties on the inspection; but I cannot say how many of them were of this kind. The object of the inspection is to ascertain the defective ties, so that they may be known from the good ties; and it was agreed that this should be done by Alexander. If they took these cull ties and hauled them off, I should think they were good enough for them to pay for, and they ought to be worth as much as the others if they took them the same. I commenced making ties about October, 1886, and, during all this time I had settlements at the end of each month, and was paid in full for the ties and transactions had during that month, and I gave my receipt signed by my signature, acknowledging a settlement in full; except these cull ties were not paid for." Here the witness was shown the items and receipts for each month he had made ties, and he acknowledged that he had signed the receipts monthly; and the counsel for plaintiffs at this point admitted that both of the plaintiffs had given receipts in full settlement for each and every month for all the time they worked. The witness then proceeded: "There was nothing said about cull ties at the time we contracted. The inspection we agreed to, I suppose, was to find out the bad ties we made. That was the object of it. I never went to the South Missouri Land Company and demanded pay for these cull ties we have sued for."

Jerry Lindersmith, a witness for the plaintiff, testified: "I am the brother of plaintiff Lindersmith in this suit. I hauled the ties out. The ties sued for were cull ties, but they looked to me to be as good as the ones

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they took, and I suppose they were worth twenty cents. I was present when the contract was made, and Alexander told plaintiffs he would pay them twenty cents apiece for all ties, to be paid for weekly in goods, or monthly in cash."

This was all the testimony offered by the plaintiffs.

Ira Alexander testified as follows for the defendant: "I was, at the time Lindersmith and Moreledge were making ties, in the employ of the South Missouri Land Company, and had charge of all the tie business in the woods. I employed plaintiffs to make ties, and agreed to pay them twenty cents apiece for all good ties, and was to pay nothing for bad ties, and the inspections were to be made by me. The ties were to be delivered on the right of way each week, and I was to inspect them at the end of each week, and was to pay them in goods each week if they wanted the goods, and at the end of each month they were to be paid in cash for what was due. I made the inspections and paid them in goods each week as they wanted them, and then, at the end of each month, we settled in full, and each of them gave receipts in full settlement of their accounts. It was expressly understood that they were to get nothing for cull ties. The cull ties they have sued for are still scattered along the line, and have not been used or converted by the company. They are of no use to us. The timber was the company's out of which the ties were made."

W. E. Drew, superintendent of the defendant, testified, among other things, as follows: "The culls are useless to us, is why we do not pay for them. We have not used nor converted these cull ties sued for. They are on the line of the road yet, and I have no use for them. I have settled with these men, and have here (exhibiting receipts for each month given by plaintiffs which plaintiffs' attorney admitted that the plaintiffs had given) the receipts in full for all the ties they ever made. They took the money without complaint or question, and signed the receipts, and have never demanded

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anything more from me on this tie account. The company does not owe them a cent. We furnished them timber, and the contract was that if they made cull ties, they could not get any pay for them. It is a dead loss for us to have cull ties, because we lose the value of the timber which is thus spoilt, and, under the contract, they were to lose their labor for making ties. The loss of labor was to stand against our loss of timber." The witness admitted on cross-examination, that he had no conversation with the plaintiffs about the contract, and that all he knew about it was what he told Alexander to do in making it, but he added: "I settled with Lindersmith and Moreledge personally and took receipts in full for the whole transaction."

Upon this evidence, the jury returned a verdict for the plaintiffs in the sum of thirty-five dollars, half the sum sued for; judgment was entered thereon, and the defendant prosecutes this appeal.

We are of opinion that, upon the above evidence, plaintiffs were not entitled to recover anything. The only discrepancy which we discover between the evidence given on behalf of the plaintiffs and that given on behalf of defendant, relates to the question whether it was understood at the time of the making of the contract that the plaintiffs were *not* to get anything for culls or rejected ties. The plaintiffs' evidence is to the effect that nothing was said about whether they were to be paid for culls, and the defendant's evidence is to the effect that the understanding was that they were to get nothing for culls.

Leaving out of view this disputed question, the evidence shows conclusively the following facts: (1) That the subject-matter of this action was covered by an express contract between the parties; that, by the terms of this contract, the plaintiffs were to get twenty cents each for standard ties, and that it was not provided in the contract that they should get anything for rejected ties or culls. (2) That, in pursuance of this contract, the parties accounted together and settled from time to

time; that their last settlement was a settlement in full of all that was claimed to be due under the contract; and that there is no evidence of fraud or mistake such as is necessary to avoid this settlement. (3) There is no evidence that the defendant has used any of the rejected or cull ties *as ties*—that is, that they have put them to the use for which the ties were gotten out.

It is scarcely necessary to discuss a proposition so plain as that, upon a case in which the testimony presents the above elements, there can be no recovery upon the theory of an implied contract. It is an elementary principle that the law never implies a contract where the parties have made an express contract which covers the whole subject-matter of the controversy. *Christy v. Price*, 7 Mo. 431. It is another principle equally indisputable that where parties having mutual matters of account between them, growing out of a contract, deliberately account together and state a balance, and the party who, on such accounting, is found indebted to the other, pays the debt, or gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be reopened or gone into, either at law or in equity, except upon clear proof of fraud or mistake, or of an express understanding that certain matters were left open for future adjustment. *Pickel v. Chamber of Commerce Association*, 10 Mo. App. 194, and cases cited; s. c., affirmed, 80 Mo. 65; *Gas Light Co. v. St. Louis*, 11 Mo. App. 73.

Here, then, the contract, stated according to the claim of the plaintiffs, was that they were to get twenty cents apiece for standard ties, subject to the inspection of Alexander, and there was no agreement that they were to get anything for rejected ties or culls. They have settled under the agreement, and it is admitted that they have been paid in full for all that they were to get under the agreement. They now seek to recover the reasonable value of the rejected ties or culls; and, if other difficulties were out of the way, they would at least have to prove that, notwithstanding they were

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rejected by the inspector agreed upon by the terms of the contract, the defendant subsequently had accepted them by taking possession of them and using them for the purpose for which they were made. But, although the plaintiffs' evidence (denied by that of the defendant) tends to show that the defendant took possession of them, there is no evidence that the defendant has ever used a single one of them as ties. The timber of which they were made belonged to the defendant. The defendant did not lose its right of property in the timber from the mere fact that the plaintiffs had attempted to make ties out of it which would not pass inspection; but the defendant had a right to take possession of the timber thus made into imperfect or rejected ties and to do what it pleased with it, since it was its own.

This action, therefore, has no foundation whatever, either in law or in justice. It would not subserve the purposes of justice to remand such a case for further contestation.

The judgment will be reversed, but the cause will not be remanded. It is so ordered. All the judges concur.

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AUGUST F. BLESSE, Respondent, v. CATHERINE P. BLACKBURN *et al.*, Appellants.

St. Louis Court of Appeals, May 22, 1888.

PROMISSORY NOTE—TITLE OF PLAINTIFF.—In a suit on a promissory note, where it is denied that the signature of the plaintiff's endorser is genuine, and evidence is improperly admitted on that issue, it will not follow that a judgment for the plaintiff must be reversed. It was not material to the plaintiff's title that the signature was genuine. It appearing clearly from all the evidence that the plaintiff advanced the money and bought the note from the payee, to hold it for the accommodation of the makers, the judgment was manifestly for the right party, and it should be affirmed.

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APPEAL from the St. Charles Circuit Court, HON. WILLIAM W. EDWARDS, Judge.

Affirmed.

T. F. McDEARMON and C. W. WILSON, for the appellants: The court erred in admitting any testimony in relation to the alleged signature of A. H. Beyl on the back of the note in suit. It was not necessary for him to indorse in order to entitle plaintiff to recover. A transfer by delivery was sufficient. *Patterson v. Cave*, 61 Mo. 439; 1 Danl. Neg. Inst., secs. 729, 741. The trial court erred in admitting in evidence the J. Phil. Hoehn check and the Union Savings Bank book, for the purpose of proving the signature on the back of the note to be that of A. H. Beyl, or for any other purpose. *State v. Clinton*, 67 Mo. 380, 383, 385; 1 Greenl. Evid., sec. 580; *State v. Scott*, 45 Mo. 304, 305, 306; *Rose v. Bank*, 91 Mo. 399. It was error to permit the plaintiff to examine the witnesses Beyl, J. P. Hoehn, W. W. Kirkpatrick, Jno. E. Stonebraker, and J. H. Alexander in relation to the identity of the signature or handwriting on the back of the note and check, and erred in admitting any of said testimony. *Rose v. Bank*, 91 Mo. 399; *State v. Clinton*, 67 Mo. 380. It was equally erroneous to admit this testimony on cross-examination. *Rose v. Bank*, 91 Mo. 380, 402, 403. If Ruenzi, one of the makers, produced the money and took up the note, it was a payment, and discharges the note. 2 Danl. Neg. Inst., p. 250, sec. 1221; *Wolff v. Walter*, 56 Mo. 292; *Quigley v. Bank*, 80 Mo. 289. It cannot be shown that he was acting as the agent of Blesse, so as to convert Blesse into a purchaser. 2 Danl. Neg. Inst., p. 251, sec. 1222. As the court sat as a jury in the trial of this cause, the rules as to the admission of evidence must be applied with the same stringency as if the cause had been submitted to a jury.

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CARL DAUDT, for the respondent: The court did not err in permitting the plaintiff to prove that Beyl assigned said note to plaintiff. It may be conceded that no endorsement by the payee was necessary to enable the plaintiff to maintain an action thereon in his own name; that transfer by delivery was sufficient. The issue, however, was plainly made by the pleadings, and plaintiff necessarily was put to his proof on that issue. Furthermore, a transfer by delivery of the note sued on did not invest the plaintiff with its legal title, but only with its equitable title, with the right to maintain an action thereon in his own name. *Boeka v. Nuella*, 28 Mo. 180; *Quigley v. Bank*, 80 Mo. 295. In order to prove that plaintiff held the legal title, that he was the legal holder of the note, it devolved on him to prove the written endorsement. The court did not err in admitting in evidence the I. P. Hoehn check. The witness Beyl, in his examination in chief, had positively sworn that the name "Henry Beyl" on the back of the note was not his signature; that he never signed his name in that way; that he always wrote his name on checks and notes "A. H. Beyl." Can it be pretended that it was not legitimate cross-examination to show that the witness, within a few months after said transaction, had endorsed his name on checks in the manner claimed by plaintiff? The J. P. Hoehn check was admitted by Beyl, in his cross-examination, to be genuine. Upon that admission, the check was introduced in evidence to enable the experts to use the same as a standard of authority, and to enable the court to make the comparison. *Rose v. Bank*, 91 Mo. 399. The only issue presented by this record is a question of fact. Did the plaintiff purchase the note, as alleged in his petition, or was that note paid as alleged in defendants' answer? This question of fact the trial court decided in favor of the plaintiff. The declarations of law given in the case are conceded to be correct. The judgment ought, therefore, to be affirmed.

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THOMPSON, J., delivered the opinion of the court.

This action is brought upon a promissory note for the sum of two hundred and fifty dollars, executed May 11, 1881, payable eighteen months after date, to the order of Henry Beyl, bearing interest from date at the rate of eight per cent. per annum, jointly signed by the defendant, Catherine P. Blackburn, who is the principal debtor, and the defendant Feuerstein and also Joseph W. Ruenzi, as sureties. The petition alleges that the payee, Henry Beyl, assigned and delivered the note for a valuable consideration to the plaintiff, and that the plaintiff is the legal holder of it. The answer admits the execution of the note, but denies that it was assigned by Beyl to the plaintiff or that the plaintiff was the legal holder of it, and pleads payment. The cause was tried by the court sitting as a jury, and there was a finding and judgment in favor of the plaintiff.

The only exception which is brought to our attention is the ruling of the court upon an item of evidence. The note appeared to have been endorsed by Henry Beyl. It was thought material by the defendants to show that this endorsement was not the signature of Beyl. Beyl so testified on the witness-stand, though he broke down on cross-examination. What shook his faith in the genuineness of his own signature was the introduction of a check drawn by him, the signature of which was admitted to be genuine, and its use for the purpose of comparison with his alleged signature on the back of the note in question. We concede that this ruling of the court was not technically correct, under the rule recently laid down by the Supreme Court in *Rose v. Bank*, 91 Mo. 399. But it does not follow from this that the judgment in the present case is to be reversed. The signature of Beyl on the back of the note was not necessary in order to pass title to it to Blesse, and it was, therefore, not material to Blesse's title that the alleged signature was genuine. The evidence of Beyl was to the effect that the money was loaned by him to Ruenzi;

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that he demanded payment of Ruenzi after the note had been due for some time; and Ruenzi brought him two hundred and fifty dollars, the face of the note, whereupon he delivered the note to Ruenzi, but without endorsing it, and charged the interest due on the note against Ruenzi on his books, which interest is still unpaid. The evidence of Blesse and of Ruenzi, the latter called as a witness for the defendants, was to the effect that when Beyl demanded payment of the note of Ruenzi, the latter went to Blesse and made an arrangement with Blesse that Blesse should advance two hundred and fifty dollars, for the purpose of taking the note up and having it transferred to him, Blesse; that Blesse gave this money to Ruenzi; that Ruenzi took it to Beyl, turned it over to Beyl, and received the note from Beyl; that either Beyl endorsed his name upon the back of the note, or that the endorsement of Beyl's name was written by another man in the presence of Beyl and Ruenzi; and that the note, thus endorsed, was delivered by Ruenzi to Blesse. In this transaction Ruenzi acted as the agent of his sister, Mrs. Blackburn, the principal maker of the note. This evidence is indisputable upon the record.

Such being the facts, it follows as a conclusion of law that the note was not paid. Payment is a question of intent, but the intent must be the intent of both the payer and the payee. Here it is immaterial whether or not Beyl supposed that the note was paid. As between the other parties to the transaction, it was a mere purchase of the note from Beyl with money advanced by Blesse, and a transfer of it to Blesse. Clearly, then, Blesse is entitled to recover upon the note. Whatever errors may have been committed at the trial, the judgment was for the right party, and we are prohibited from reversing it by the terms of section 3775 of the Revised Statutes. This conclusion has been reached by all the members of the court after much consideration.

The judgment will be affirmed. All the judges concur.

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DEANE STEAM PUMP COMPANY, Respondent, v. GREEN & CLARK, Appellants.

St. Louis Court of Appeals, May 22, 1888.

1. **PRACTICE—DEPOSITION—INSUFFICIENT AUTHENTICATION.—An objection to a deposition for insufficiency of authentication cannot be raised for the first time when it is offered at the trial, no motion to suppress having been previously filed.**

2. **EVIDENCE—AGENCY.—Proof of agency by the testimony of the agent is admissible, except in the case of a husband or wife testifying, one for the other, on the score of agency; in which case the agency must be proved by other evidence.**

3. **COUNTER-CLAIM—INSTRUCTIONS.—A defendant cannot complain of an instruction to the effect that there is no evidence supporting his counter-claim, when in another instruction he is given the benefit of all that is shown in that connection, by a deduction to be made from the plaintiff's claim, provided the jury shall find the proofs sufficient therefor.**

APPEAL from the St. Louis Circuit Court, HON. GEORGE W. LUBKE, Judge.

Affirmed.

DAVIS & DAVIS, for the appellants: The respondent guaranteed that the pump would perform the work required as set forth in the order. Wharton on Agency, secs. 89, 158, 177, 415; *Mundorff v. Wickersham*, 63 Pa. St. 87. There was evidence to support the first and second items of defendant's counter-claim. Because the changes were made at the agent's request, within the scope of his employment and for plaintiff's benefit. 2 Greenl. on Evid. [10 Ed.] sec. 108; *Hill v. Packard*, 69 Me. 158.

MILLS & FLITCRAFT, for the respondent: The objections to the depositions were not specific. There had been no motion to suppress and no suggestion as to incomplete or insufficient authentication until after both parties had announced themselves ready and the

jury had been sworn and the first offer of evidence made. Supposing there had been a guaranty, the defendant could not assert a counter-claim for unliquidated damages on such guaranty in a suit originating before a justice of the peace. *Walker v. Lewandovska*, 15 Mo. App. 581; *Emery v. Railroad*, 77 Mo. 339.

PEERS, J., delivered the opinion of the court.

This action was commenced before a justice of the peace in the city of St. Louis on an account. The petition is in two counts; the first being for repairs and alterations on a certain duplex pump, and the second for the agreed purchase price of a number four piston pump; the entire demand being for $212.12. The defendants filed a setoff containing several items for money paid, laid out and expended, all growing out of the same transaction. The justice dismissed the counterclaim, and rendered judgment for the plaintiff for the full amount of its claim. The defendants thereupon appealed to the circuit court, where, upon a trial before a jury, a verdict and judgment was rendered for the plaintiff, and the defendants again appeal and bring the case here.

The trial court is complained of for: (1) Admitting illegal testimony offered by respondent; (2) rejecting legal testimony offered by appellants, and (3) refusing to give proper and legal instructions offered by appellants.

Now as to the testimony. Plaintiff offered to read the deposition of Bellows and Aubrey, to which the defendants objected on account of insufficiency of authentication; this objection the court overruled on the ground that no written motion to suppress had been filed. In this ruling the court committed no error. No suggestion as to incomplete or insufficient authentication had been made until after both parties had announced themselves ready for trial and the jury had been sworn, and the first offer of evidence made. The objection came too late. "A party cannot lie by

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until his adversary has announced himself ready for trial, and for the first time, when he offers to read his depositions, object to them on account of some alleged informality in the taking or authentication thereof." *Holman v. Bachus*, 73 Mo. 49.

We see no force in the objection made to the answer of the witness Dudley that "he was the agent of the plaintiff." The rule invoked by the defendants only applies in a case where the wife or husband desires to testify for each other on the score of agency. Then the rule is, as laid down by the trial court, that inasmuch as the witness would not be competent without showing the agency, the agency must be shown by some testimony other than that of the witness. The objection was properly overruled.

The defendants complain that the court erred in instructing the jury that there was no evidence supporting the three items of defendants' counter-claim.

Assuming that the testimony tended to show that the pumps were sold with a guarantee to give satisfaction, yet the ruling of the court was proper because the three items set up as a counter-claim, are not proper items of the defendants' damages for breach of such a contract. The court, at defendants' instance, did instruct the jury that if the plaintiff guaranteed the pumps, and they did not comply with the guarantee, they could not recover for expenses of alteration and repair herein sued for, if such alterations and repairs were necessary to bring the pumps to the guaranteed standard. Thus the defendants got the benefit of all their evidence, substantiating a claim of guarantee and its breach, and as the finding of the jury was against them on that claim, they have no cause to complain.

Other instructions given on behalf of the plaintiff and defendants put the residue of the issues before the jury as favorably as the defendants had any right to demand under the evidence.

There being no error in the record, the judgment is affirmed. All concur.

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MARY L. TYLER, Respondent, v. JOHN G. PRIEST, Administrator, Appellant.

St. Louis Court of Appeals, May 22, 1888.

ADMINISTRATION—WHAT ASSETS SUBJECT TO DEMANDS OF CREDITORS. In a proceeding against an administrator to compel payment of a judgment which has been ordered by the probate court to be paid in the regular course of administration, the creditor can make no claim upon assets which the administrator had disbursed to distributees and for expenses of the estate, before the creditor's demand accrued. But where the administrator has collected rents from lands previously partitioned to some of the distributees, and, having incorporated them with the funds of the estate, has disbursed the amounts in the course of his administration, and has afterwards collected the amount of a judgment against the representatives of a former grantor for breach of a covenant of warranty attached to the lands, the sum so collected is not to be regarded as a trust fund in the administrator's hands for the benefit of the distributees whose rents were received and disbursed by him, but must be treated as assets of the estate, liable for satisfaction of the judgment which the probate court has ordered to be paid.

APPEAL from the St. Louis Circuit Court, HON. LEROY B. VALLIANT, Judge.

Affirmed.

W. H. CLOPTON, for the appellant: The personalty of Isaac Walker's estate was exhausted long prior to notice of the claim of plaintiff. The funds in the administrator's hands, must be distributed among the devisees whose realty contributed to the payment of the Houghan· dower, according to their respective interests. *McLeod v. Davis*, 83 Ind. 263; *Virdwell v. Virdwell*, 84 Ind. 224; *Towle v. Swanzy*, 106 Mass. 100; *Heir v. Priest*, 15 Mo. App. 591. Heirs of a warrantor are liable *pro rata* for breach of the ancestor's covenant of warranty. A judgment cannot be had against one for the whole debt. *Walker's Adm'rs v. Deaver*, 79 Mo. 664. The fund in the hands of the administrator consists of rents from the shares of two

out of eight devisees, in the estate of Walker. The rents in hands of the administrator must be regarded as real estate devised to the two devisees. The devisees of Isaac Walker take their shares in the real estate discharged of the special debts of the testator. *Sauer v. Griffin*, 67 Mo. 657. The rents are not assets for the payment of specialty debts. They must be treated as a part of the realty which was devised to the two devisees from whose shares the rents were collected. Devisees in this state, at the time of the death of Isaac Walker, took their shares in the realty discharged of the specialty debts of the testator, as at common law. *Sauer v. Griffin*, 67 Mo. 657. Rents of real estate are not assets for the payment of debts and the heirs of a deceased insolvent even, are entitled to the rents of the real estate of the deceased up to the time when it is sold for the payment of debts. *Gibson v. Farly*, 16 Mass. 280; *McCoy v. Scott*, 2 Rawle, 222; *Stearns v. Stearns*, 1 Pick. 157; *Newcomb v. Stebbins*, 9 Met. 540; *Palmer v. Palmer*, 13 Gray, 326. Even if the administrator has paid debts with such rents they can be collected of him by the heir. *Griffith v. Beecher*, 10 Barb. 432; *Hawkins v. Kimball*, 57 Ind. 42; *Goodrich v. Thompson*, 4 Day, 215. In *Scudder v. Ames*, 89 Mo. 511, the court say that an administratrix is not authorized to collect rents. True it is, that in *Gamble v. Gibson*, 59 Mo. 585, and *Dix v. Morris*, 66 Mo. 514, our Supreme Court have held that in making settlements between administrators and the heirs the sureties of the former will be held liable on their bond for rents collected by the administrator. They are treated as assets for that purpose only.

HITCHCOCK, MADILL & FINKELNBURG, for the respondent: The petitioning creditor having established her demand for $1,389.02 against this estate is entitled to be paid out of any assets in the hands of the administrator sufficient to satisfy the same. The last annual settlement filed April 23, 1887, (since this motion was

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heard in the probate court), shows a balance of $10,412.78 in the hands of the administrator, $5,733.03 of which is disputed and $4,679.75 of which is undisputed. There being no other unsatisfied debts, either one of the above amounts is sufficient to cover this claimant's demand in full. The disputed item of $5,733.03 was properly charged against the administrator by the probate court. The undisputed item of $4,679.75 was not received from the rents of real estate but from a personal judgment recovered by the administrator against a third party. The administrator cannot appropriate assets coming into his hands and withhold them from creditors for the purpose of equalizing supposed previous equities between devisees. The claims of creditors are prior in right and superior in grade. The administrator has with the consent of the devisees retained a portion of the realty and has collected and is still collecting the rents thereof; has commingled these rents with the other personal assets and income for many years; has expended the personalty indiscriminately in course of administration for various purposes, and shows a balance in his hands sufficient to pay the demand of this claimant. The administrator cannot now recoup on the balance thus shown to be in his hands for the purpose of reimbursing devisees or himself to the exclusion of creditors, especially in view of the fact that a part of the balance now in his hands consists of money collected on a judgment which is a personal asset, and in its nature primarily applicable to the payment of debts. The administrator in conjunction with the devisees has by his conduct, precluded any right of action against the estate up to this time by paying the annuity, and he now prevents a resort to the statutory power to sell real estate by reporting personal assets sufficient to pay the present claim. Petitioner cannot resort to the realty by the statutory mode because the administrator makes an annual showing of money on hand, but when she asked to be paid out of the fund in his hands the administrator says: It represents realty and is not applicable to the payment of debts. This is

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an inconsistent and inequitable position, and the administrator should be estopped from making such a defence against this creditor. The question whether devisees are liable on the warranty of their ancestor, in this state, does not arise in this proceeding. Pending administration, lands are assets subject to the debts of the deceased. Rev. Stat., sec. 146; *Shaw v. Nicholay*, 30 Mo. 99, 107; *Carson v. Walker*, 16 Mo. 68, 87. Partition of lands before final settlement of the estate does not withdraw them from liability for the debts of the deceased. Rev. Stat., sec. 3350.

THOMPSON, J., delivered the opinion of the court.

The plaintiff recovered a judgment against John G. Priest, administrator *de bonis non, cum testamento annexo*, of the estate of Isaac Walker, deceased, in the circuit court of the city of St. Louis, on the twenty-eighth of October, 1885, for the sum of $1,389.02. The action which resulted in the recovery of this judgment was commenced on the twelfth of August, 1884. It was brought under section 191, Revised Statutes, to establish in the circuit court a demand against the estate of Isaac Walker, deceased. This demand consisted of the payment by the plaintiff of two instalments of money to a dowress, the same being instalments of an annuity charged by a judgment of the St. Louis land court, in 1864, upon land conveyed by the defendant's testator, Isaac Walker, deceased, to the plaintiff, in the year 1857, with covenants of warranty. In other words, it was an action for damages for the breach of a covenant of warranty against incumbrances. From the judgment of the circuit court, rendered in that action, an appeal was prosecuted to this court, where the judgment of the circuit court was affirmed on the twentieth of April, 1886. *Tyler v. Priest*, 21 Mo. App. 685, erroneously reported as *Taylor v. Priest*. In the concluding part of our opinion in that case, we held that the question of the classification and payment of the judgment, including the question whether there were any assets available

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for its payment, or whether the lands of the testator in the hands of his devisees could be subjected to its payment or not, were questions relating to the *execution* of the judgment, which could not be determined in that action. These questions present themselves for determination in the present proceeding.

After the judgment of the circuit court had been thus affirmed, it was presented to the probate court, and that court entered an order directing that it should be paid in due course of administration. The administrator declined to pay it, claiming that there were no funds in his hands available for that purpose. Thereupon the plaintiff filed her motion in the probate court, praying for an order upon the administrator to pay it. This motion was overruled by the probate court, after a most careful examination of the questions involved and after the filing of a very learned and able opinion upon those questions, which we have had the advantage of reading, but with which we have not been able entirely to agree. The plaintiff appealed to the circuit court where the motion was heard *de novo*, as required by the statute.

In support of her motion in the circuit court, the plaintiff showed that, according to the last annual settlement, filed by the administrator on the twenty-third of April, 1887, he had in his hands a balance of $4,679.75, to which the probate court had added the amount of $5,733.03, for error in settlement, thus making the total amount charged against him to be $10,412.78.

This surcharge of $5,733.03, made by the probate court, arose under the following circumstances: Thomas A. Walker, executor of Isaac Walker, deceased, was removed by the probate court on account of his being a nonresident of the state, and John G. Priest, the present administrator, was appointed administrator *de bonis non, cum testamento annexo*, in his place. Walker appealed from this judgment of removal, and it was reversed by this court. *In re Walker*, 1 Mo. App. 404. Thereupon Walker was reinstated as executor, where-

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upon, on settlement between him and Priest, there was found to be in Priest's hands assets belonging to the estate to the amount of $5,394.21, for which the probate court rendered a judgment against him that he pay it over to Walker. Subsequently Walker was again removed and Priest re-appointed. Thereafter another settlement took place between Walker and Priest, in which it appeared that Priest had not paid over to Walker the amount above mentioned, to-wit, $5,394.21. Nor had he, in his own settlements, accounted therefor, nor charged himself therewith. On motion of some of the legatees, the probate court, in June, 1880, ordered Priest to charge himself with said sum, and in January, 1881, added the same to the balance of his annual settlement for that year. In his next annual settlement, which took place in April, 1882, he charged himself with this sum of $5,394.21, and, in explanation of his reason for not charging the judgment against himself in his former settlement, he showed that an effort had been made to wind up the estate by a settlement among the heirs and the devisees, which had failed of accomplishment; and he claimed credit for certain expenditures constituting the items in issue on the settlement between him and Walker, which resulted in the judgment of the probate court in favor of Walker's estate, and against him, for the sum of $5,394.21, as above stated, and for sums distributed to the legatees in the aggregate sum of $5,733.03; and he produced a voucher in support of the same signed by five of the legatees, in which they undertook to authorize him to take credit for this sum in his settlement, and waived all objections thereto. This charge and credit were stated in his settlement as follows:

"Cash paid sundry items for costs, attorney's fees, and other disbursements specified in the account and ordered filed as an exhibit marked 'O' herewith, as per authorization.......... $5,733 03"

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RECAPITULATION.

"Disbursed on acc. blk. 808 and other property in Cabanne & Walker's sub-division, being blocks 796 and 838 per statement........... $2,314 97

The "exhibit O" thus referred to was as follows:

"The undersigned, legatees under the will of Isaac Walker and distributees of said estate, by this instrument, consent and authorize John G. Priest, administrator *de bonis non* of said estate, to credit himself in his settlement account with said estate, in and before the St. Louis probate court, with the annexed statement and account, amounting in the aggregate to fifty-seven hundred and thirty-three 3-100 dollars, and we waive all objection thereto, and authorize the said St. Louis probate court to allow the same in the settlement of said administrator's accounts.

"[Signed] WM. M. GAWTRY, Trustee,
"PETER I. NEVIUS, Trustee,
"S. F. JENKINS, Trustee,
"ARCHIBALD MACLAY, Trustee
"G. W. BULL,
"R. MACLAY BULL.

"New York, Jan. 6, 1882."

"Disbursed, items disallowed by St. Louis probate court:

Krum & Patrick........................	$ 250 00
Hall, reporter	10 00
Clinton, Hall & Brewer, for depositions.	38 50
Other small items....................	57 80
Disbursed, accounts of heirs, per statement..............................	2891 91
Total..............................	$5733 03

"Filed April 1, 1882."

When this credit and so-called "authorization"

were presented, the probate court declined to pass the credit, but added the amount of $5,733.03 to the balance as stated by the administrator, making it $14,733.46, instead of $8,997.43, as stated by Mr. Priest. In each successive annual settlement made by him since that time, he has ignored the action of the probate court in the above matter, but the probate court has, in each instance, surcharged his account with the said sum of $5,733.03, by adding the sum to the balances as successively stated by him. Thus the matter stood at the time of the ninth and last annual settlement prior to the trial in the circuit court, which was filed on the twenty-third of April, 1887, as already stated.

It is now claimed by the plaintiff that this item of $5,733.03, consisting, according to the settlement of Mr. Priest, of moneys disbursed by him for the expenses of litigation, on account of real estate, and to the legatees, should be treated as so much money in his hands subject to the payment of debts, and that the act of the probate court in disallowing the credit and surcharging him with it in each of his annual settlements, should be conclusive upon the question of his obligation to pay this judgment. In his opinion, to which we have already alluded, the learned judge of the probate court took a different view of this question, in the following language: "The court refused to allow this credit, first, because the authorization did not come from all the legatees, and next, and principally, because there was no proof that all the debts had been paid, and because, on an annual settlement, the court could not conclusively adjudge the question. In every subsequent settlement the administrator asked, and the court refused, the allowance of this sum as a credit, deferring a decision of the question to the final settlement. There is, therefore, a difference between the account as stated by the administrator, and as sanctioned by the court, of the sum of $5,733.03. This item, it is claimed by the creditor [meaning this plaintiff], does not constitute a proper credit, resting, as it does, upon a private arrangement

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between the legatees and Mr. Priest, which cannot affect the rights of creditors. Nothing is clearer; that is the precise ground upon which the court declined to allow the credit; *prima facie*, it is not allowable, either against creditors or against the legatees, who may not have signed it, and cannot be allowed, or disallowed, conclusively until the parties whose rights are affected thereby are before the court, or have such notice as will invest the court with jurisdiction over them. It does not follow, however, that the amount surcharged constitutes assets available for the payment of debts of which the administrator had no notice at the time the disbursements were made. These disbursements assumed or admitted by the legatees, the signing of the voucher clearly estops them from denying their validity; they are, therefore, valid as distribution or payment of legacies, which none can dispute save those who have a paramount right to the assets distributed. It may be that a portion of the sum is justly coming to the legatees who have not signed the voucher, although this is not probable, for a reason to be stated in connection with another point hereafter. But it is just as clear that subsequently proved claims cannot be charged against the amounts so paid out, as it is that the rights of creditors prior thereto were not thereby affected."

We incline to agree with the views of the learned judge of the probate court touching the matter, so far as this item is concerned. This surcharge which the probate court has made against the administrator may or may not be assets subject to the payment of debts, accordingly as the propriety of it shall be determined upon a final settlement, where all the interested parties are before the court. While the annual settlements of an administrator are not evidence in his own favor (*State to use v. Roeper*, 82 Mo. 57), it is equally true that the orders of the probate court approving or disapproving the same are provisional merely; they are not a judgment; they conclusively establish nothing for or against him. *Ibid.* No appeal may be taken from such an

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order, but the annual settlements are open and subject to review upon final settlement. *North v. Priest*, 81 Mo. 561; s. c., affirmed, 9 Mo. App. 586; *Ritchey v. Withers*, 72 Mo. 556. If this demand had existed at the time when Priest made the disbursements for which he thus claims credit on the authorization of some of the legatees, and it had been presented to him for allowance and he had nevertheless improvidently made these disbursements, they would constitute no defence to an application for an order upon him to pay this demand; because this demand would have been preferred, on any theory, to the greater portion of the disbursements for which he thus claims credit, and he would have made them in violation of law and would have no one to blame but himself. *North v. Priest, supra; Bassett v. Slater*, 81 Mo. 75.

It is argued on behalf of the plaintiff that, as Priest knew of the existence of this item and recognized it by making annual payments of this annuity to Mrs. Houghan, the case stands on the same footing, except in respect of classification, as though it had been formally presented to him, or he had waived a formal presentation, in writing, under the statute, prior to the making of such disbursements. We do not think that this view is tenable, for the reason that no part of this demand existed at all until long after the time when Priest made these disbursements. This follows from what we held in *Tyler v. Priest*, 21 Mo. App. 685, in which we affirmed the judgment establishing this demand. We there held that the statute of limitations of two years in the administration law did not apply to this demand, because it could not have been so presented as to save the bar of the statute. "It did not arise until the payments of the annual instalments had actually been made to the dowress by the plaintiff. Until that time, no demand could have arisen from the nature of the case. It was not a case of *debitum in praesenti solvendum in futuro*, because the liability to pay the successive instalments was contingent upon the survival of the

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dowress. She might die, and then nothing further would be paid. The payment of each instalment was in the nature of a fresh eviction, so far as giving a right of action was concerned, and the statute of limitations in such a case runs only from such payment." It is true that, down to 1883, Mr. Priest and his predecessors recognized and paid the successive claims of the plaintiff for moneys advanced annually by her to pay the annuities of Mrs. Houghan, and took credit therefor in their final settlements. But these successive instalments, as we held in the foregoing reasoning, were in the nature of separate demands which did not exist as demands until they accrued. Until that time they were contingencies merely—demands which might or might not accrue with each recurring year, depending upon the concurrence of two circumstances,—the continued life of Mrs. Houghan and the payment of the annuities to her by the plaintiff. It cannot be concluded from these premises that Mr. Priest was under an obligation to retain in his hands moneys to meet these contingent demands, and that his failure to do so brings him within the principle of *North v. Priest*, *supra;* and *Bassett v. Slater*, *supra*.

If we lay this disputed item out of view, it nevertheless appears that, independently of it, there was, according to the last annual settlement of Mr. Priest, in his hands the sum of $4,679.75, which was a part of a larger sum collected by him as administrator, on the third of November, 1886, upon a judgment recovered by him as administrator in a suit brought in behalf of the estate against James A. Deaver and others for damages sustained by the estate of Walker by a breach of warranty on the part of the ancestor of the Deavers. The nature of this judgment will appear from the case of *Priest v. Deaver*, 22 Mo. App. 276, where the judgment of the circuit court was affirmed after directing a *remittitur*. See also another similar case in 5 Mo. App. 139, and 79 Mo. 664. This judgment was nothing more than a recovery over by Priest, as the personal representative

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of Isaac Walker, deceased, for his covenant of warranty made to Walker, broken by the incumbrance of Mrs. Houghan's dower interest. It, therefore, grew out of the same matter as the judgment which the plaintiff is endeavoring to coerce the administrator to pay in this proceeding. It was a judgment for the proportionate share of two of the heirs of Larkin Deaver, deceased, of eight annual instalments of six hundred and fifty dollars each, which the plaintiff, as administrator of Isaac Walker, deceased, had paid to Mrs. Houghan, to discharge the annuities into which her dower interest had been converted under the judgment of the land court of St. Louis.

The theory on which it is claimed that the money collected upon this judgment, so recovered by Priest, is not assets belonging to the estate, is that this money has been really collected from rents of the real estate of two of the devisees, previously set apart to them in partition, but who voluntarily left their estate in the hands of the administrator. The theory is that, having the right to take possession and collect the rents for themselves, they nevertheless allowed the administrator to remain in possession and collect the rents; that these rents were disbursed in the payment of Mrs. Houghan's annuity; that this judgment in the case of *Priest v. Deaver* was simply a recovery back by Priest of the money so disbursed, from the heirs of Deaver upon their ancestor's covenant of warranty; that, although Priest collected these rents as administrator and charged himself with them in his annual settlements, and disbursed them in payment of a demand which was undoubtedly a liability of the estate of his testator, yet, it is nevertheless to be regarded that he held these rents as trustee for the two devisees of his testator, and not as administrator, and that, although he paid them out in his character of administrator, in satisfaction of a demand against the estate of his testator, they did not lose their character of a trust fund; and that, when he recovered the judgment over against the heirs of Deaver,

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he is to be regarded as having merely recovered back this trust fund so paid out. We confess ourselves entirely unable to follow this reasoning. Mrs. Houghan's annuities were a liability of the estate of Isaac Walker, during her lifetime. If the personal assets were exhausted, these annuities, as fast as they became due, became liabilities chargeable upon the lands. The administration is not yet closed; and while an administration is open, the lands, as well as the chattels, are assets for the payment of the debts of the deceased. If these two distributees neglected to take possession of the lands which were set apart to them while the others took possession of theirs, and if they allowed the administrator to collect their rents and disburse them as administrator, that is their own affair. It does not entitle them to lay hands upon a judgment recovered by the administrator, in his character as such, and prevent its distribution to creditors of the estate. They may have allowed the administrator to take this course in order to forestall an application to sell their lands in discharge of Mrs. Houghan's annuities. It may have been done, for aught we know, in pursuance of an arrangement among all the devisees, by which those who thus allowed the rents of their properties to be used, were reimbursed by the others. We do not know from this record why it was that they took this course, nor is it at all material. Having allowed their lands to remain in the hands of the administrator, and having allowed him to collect the rents of them and treat them as moneys belonging to the estate, and disburse them as such, they cannot be allowed now to recoup themselves by laying their hands upon this judgment, in preference to a creditor of the estate. See *Brigham v. Elwell*, 14 N. E. Rep. 780; s. c., 145 Mass. 520, and cases cited. Compare *Lewis v. Carson*, 93 Mo. 587.

Here is an annual settlement of the administrator, which admits that he has this amount of assets in his hands belonging to the estate. Here is a creditor of the estate holding a judgment for a much smaller amount

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than this amount of personal assets. If she cannot have execution against the administrator, what remedy has she? She cannot get an order to sell land, for it appears from the records of the probate court that there are personal assets enough to satisfy her demand. For the same reason, she cannot get any relief by going into the circuit court in an original proceeding. *Pearce v. Calhoun*, 59 Mo. 271.

But who is it that is setting up this defence? The distributees are not before the court. It may well be that cases might arise where the administrator would be bound to assert the rights of the distributees of the estate. But how can he, after collecting this amount of assets in his character of administrator, and charging himself with it as such, turn around and face a creditor and say: "This was all a myth; although I sued for it as administrator, and recovered it as administrator, and possibly levied it by execution as administrator, and charged myself with it as administrator, and when it is disbursed will undoubtedly receive my commissions for disbursing it as administrator—yet, notwithstanding all this, the appearance of my holding it as administrator is merely an appearance. It is a fiction—I really hold it as trustee for these legatees, and they are to be preferred to you, and if you want to collect your judgment, you can go into the probate court with a petition to sell land to pay it, provided you have that right at all. The partition proceedings interpose no bar. It is true that, when you get there, they may oppose you with the records of the probate court, showing that there are sufficient personal assets to satisfy your demand; but what have I to do with that?" This process of reasoning, by which a trust fund is one thing for one purpose and another thing for another purpose, does not commend itself to our approval.

All the judges concurring, the judgment of the circuit court is affirmed.

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THE CITY OF CRAIG, Respondent, v. GEORGE W. SMITH *et al.*, Appellants.

Kansas City Court of Appeals, May 23, 1888.

DRAM-SHOP LICENSE—POWERS OF CITIES OF FOURTH CLASS UNDER SECTION 4956, REVISED STATUTES—CASE ADJUDGED.—Under the provisions of the statute, as to cities of the fourth class, relating to the power of licensing dramshops (Rev. Stat., sec. 4956), the city has no authority to adopt the credit system. The money should be paid before the delivery of the license, or at least concurrently with its delivery. The act of the mayor or of the board of aldermen, or both, in accepting a note as part payment for license tax, is without authority of law, and such note is void.

APPEAL from Holt Circuit Court, HON. C. A. ANTHONY, Judge.

Reversed.

Statement of case by the court.

This action is based on the following petition:

"The plaintiff states that it is a corporation, duly incorporated under the constitution and laws of the state of Missouri as a city of the fourth class; that as such incorporated city the plaintiff had, prior to the date of the note hereinafter mentioned, by its board of aldermen, adopted and promulgated an ordinance regulating dram-shop licenses for said city of Craig; that by the provisions of said ordinance a city license tax for dram-shops was provided for at the rate of one thousand dollars per year, and such dram-shop license was not to be issued for a period of less than six months; that on the —— day of January, 1886, the defendant, George W. Smith, presented to said board of aldermen and mayor of said city of Craig his petition in conformity with the statute of the state of Missouri and the ordinances of said city of Craig, praying the said board of aldermen and

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the mayor of said city to grant to the said George W. Smith a city license to keep a dramshop in said city of Craig for a period of six months; that on the said —— day of January, 1886, the defendant paid to the said city of Craig the sum of two hundred and fifty dollars for said city license, and asked, requested, and petitioned said city of Craig, through its mayor and board of aldermen, to accept the promissory note of the defendants, herewith filed, as surety for the two hundred and fifty dollars yet due to the said city of Craig for said dramshop license; that on the payment of said sum of two hundred and fifty dollars and the making, executing, and delivering to said city of Craig the said promissory note herewith filed, dated January 28, 1886, by which defendants promised to pay to said city, for value received, the said sum of two hundred and fifty dollars, three months after the date thereof, with interest from maturity at ten per cent. per annum, said license to keep a dramshop in the city of Craig was, as petitioned for by said George W. Smith, duly issued to and accepted by the said George W. Smith, and that the said George W. Smith did open, run, and operate the dramshop by said city license authorized in said city of Craig for a period of six months; that the whole amount of said note, together with the interest thereon, remains unpaid and due to plaintiff, for which he asks judgment."

Defendants demurred to the petition for the reason, among others, that it stated no cause of action. The demurrer was overruled. On the trial, defendants objected to any evidence being given, for the reason that no cause of action was stated, in that the city of Craig had no power or authority to accept a promissory note payable to itself, for a dram-shop license. The objection was overruled.

Defendants asked an instruction in the nature of a demurrer to plaintiff's case, which, being overruled and judgment entered against defendants for the amount of the note, they appeal to this court.

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JOHN W. STOKES and H. S. KELLY, for the appellants.

I. The petition does not state a cause of action; its statement of facts shows that the city plaintiff had no power or capacity to make the arrangement and take the note sued on, and the court erred in overruling defendants' objection to the introduction of any evidence by plaintiff. 1 Randolph on Com. Paper, sec. 336; *Knox City v. Thompson*, 19 Mo. App. 523; 1 Dill. on Mun. Corp. [3 Ed.] sec. 89.

II. The instruction asked by plaintiff and given by the court should have been refused, and that asked by the defendants and refused by the court (that, under the pleadings and evidence, the finding should be for the defendants) should have been given. 1 Randolph on Com. Paper, sec. 341; 35 Iowa, 416; *Saxton v. Beach*, 50 Mo. 488; *Rumsey v. Schell City*, 21 Mo. App. 175; *Thrush v. City*, 21 Mo. App. 394; *Water Works Co. v. Kansas City*, 20 Mo. App. 237; *Worth v. City*, 78 Mo. 107; *Stewart v. Town*, 79 Mo. 603; *Rowland v. City*, 75 Mo. 134; *Cheney v. Brookfield*, 60 Mo. 53; *Mister v. City*, 18 Mo. App. 217; *United States v. Maurice*, 2 Brock, 96; *United States v. Lane*, 3 McLean, 365.

III. The court erred in admitting in evidence an entry from the journal of ordinances—there was no evidence that said ordinance had been formally and legally passed—and said journal entry was not the best evidence. Rev. Stat., secs. 4945, 4946.

IV. The court erred in rejecting the offer of defendants to prove the fraudulent action of the mayor and board of aldermen in raising, or attempting to raise, the license, and that the note was given under protest. *Hannibal v. Guyot*, 18 Mo. 515; *St. Louis v. Oeters*, 36 Mo. 456; 1 Dill. on Mun. Corp., sec. 319, *et seq.*

No brief for the respondent.

ELLISON, J.—I am of the opinion that the city of Craig had no authority to accept a note of a dram-shop

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keeper for his license, and that such note is void. As a city of the fourth class it has power to license dram-shops at a rate to be fixed by ordinance. And it is provided by section 4956, Revised Statutes, that: "When the board of aldermen shall fix the rate of taxation, the clerk of the board shall charge the collector with the full amount of such taxes levied and to be collected, together with all licenses of every kind to be collected, and it shall be the duty of said collector to pay into the treasury weekly all moneys collected by him, taking a duplicate receipt therefor, one copy of which he shall file with the clerk; and it shall be the duty of such clerk to report to the mayor any failure of the collector to deposit the weekly collections as herein provided."

When a dram-shop license is fixed by ordinance and the license is delivered to the collector he is charged with the amount and becomes responsible to the city for such amount if the license be delivered. The city has no authority to adopt the credit system. The money should be paid before the delivery of the license, or at least concurrently with its delivery. This view is sustained by the Supreme Court in analogous cases: *State ex rel. v. Spencer*, 49 Mo. 342; *State ex rel. v. Maguire*, 52 Mo. 420.

It appears in this case, from a journal entry of the board of aldermen, that "the mayor was instructed by a vote of the board of aldermen to take a properly secured note for two hundred and fifty dollars as part payment for license tax for dramshop; said note to run three months from date." This was without authority of law and was not binding on the collector. The mayor has no part in the collection of a dram-shop license, further than as a member of the board he may take part in the municipal legislation on that subject. It is the collector's duty under section 4956, Revised Statutes, to collect such license.

I consider the note void and shall, therefore, reverse the judgment. All concur.

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JAMES M. PUGH, Appellant, v. ROBERT T. EVANS, Respondent.

Kansas City Court of Appeals, May 23, 1888.

1. FEES—RIGHT OF CIRCUIT CLERK TO RECEIVE AS AGAINST HIS SUCCESSOR IN OFFICE.—A circuit clerk is entitled to receive of the fees earned by him a sum equal to the amount allowed him by law, although such fees may not be collected during his term; and the clerk receiving them (as his successor in office) would hold them in trust for this purpose. The fees earned by a clerk belong primarily to the county, and out of which the clerk is allowed by law to retain a certain sum, the amount depending upon the population of his county; and the clerk holds such fees as trustee for the purposes for which the law has destined them.

2. ——— APPLICATION OF FUNDS, AS BETWEEN CLERK AND THE COUNTY.—The trust above named would be to supply a deficiency in the receipts of a former year to cover expenses and salaries. There can be no public interest subserved in letting money earned by the clerk, and which is within the limits of his salary, go to the county.

3. PRACTICE—PLEADING—DEMURRER—CASE ADJUDGED.—If the petition fails to state a cause of action, although not for the reasons urged in the demurrer, the judgment sustaining the demurrer must be affirmed. The petition, in this case, does not allege that defendant had notice of the deficit in plaintiff's salary, nor does it appear whether defendant had the money in his hands, or has settled with the county court, and for this reason the demurrer was properly sustained. In order to hold defendant liable, it should be alleged and shown that he had knowingly misapplied the trust fund.

APPEAL from St. Clair Circuit Court, HON. DANIEL P. STRATTON, Judge.

Affirmed.

The case is stated in the opinion.

W. P. SHELDON, for the appellant.

I. The judgment on demurrer is wrong, and should, therefore, be reversed. The court erred in sustaining

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defendant's demurrer. The petition states facts sufficient to constitute a cause of action.

II. The question submitted is, whether Pugh, the appellant, is entitled to have applied the fees earned by him in each year while he was clerk of the circuit court of St. Clair county, until he shall have received a sufficient amount to pay his salary and deputy hire, as provided for by law. In the solution of this question the court's attention is called to the history of the legislation with regard to salaries and fees of clerks of courts of record, and also to the mischief the present law was intended to remedy. Prior to the constitutional enactment of 1865, section twenty-four, article six, Wagner's Statutes, clerks of courts of record were entitled by law to all fees earned by them as such. But owing to the increasing population of the state, and the growing legal business therein, salaries of clerks were deemed by the people in convention assembled to be too large, and they fixed their salaries at twenty-five hundred dollars. The legislature, in 1868 (see 1 Wag. Stat., sec. 30, p. 631) provided salaries of clerks should be twenty-five hundred dollars, exclusive of necessary deputy hire, and further, that such clerks should annually report the amount of fees received to the county court, and the excess above salary and deputy hire should be paid into the county treasury. The clerks were, by the law, to have their salaries, as fixed by law, before the county treasurer should receive anything. And the annual report provided for was intended to show the *status* of the account between the clerk and the county. The law was again amended in 1874, which will be found in Revised Statutes of 1879, sections 5626 and 5627, whereby the legislature reduced the salaries of clerks in many counties whose business was small, and increased the salaries in large counties to compensate clerks thereof for the amount of labor performed by them. This amendment provided for quarterly reports by clerks to the county court, instead of annual reports, as was formerly the law. The legislature evidently took the

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view that frequent reports would be a safeguard against fraud; hence the amendment. It was evidently not the intention of the legislature to curtail the salary of clerks and to prevent them from receiving the maximum, then allowed by law. The law was further amended in 1883. Acts of 1883, sec. 1, p. 93. The court will notice that in the amendment of 1883 the legislature has said that the clerk shall be allowed to retain for his services, for one year, the amount named, according to the population of the county of which he is clerk. What did the legislature mean when it said, that "in all counties having a population of ten thousand and less than fifteen thousand persons, the clerks shall be permitted to retain eleven hundred dollars for themselves," etc.? I take it that the legislature meant just what it said, that the clerks in such counties in Missouri should have eleven hundred dollars annually for their services as such clerks, and the fact that a sufficient amount of fees were not received by the clerk in any one year to pay his deputy hire (not to exceed the amount named by law) and his salary of eleven hundred dollars is no reason why he should not, even after he has retired from office, receive the maximum allowed him by law, provided he earned, while in office, an amount equal to the deficit in his salary, and provided further, that his successor has collected of the fees so earned a sufficient amount to pay the deficit whatever it may be. That the excess of fees earned in any given year may be applied to make up a deficit for a prior year, is settled by the case, *In re Lewis*, 52 Mo. 550. Lewis was the clerk of the circuit court of St. Louis county, and was serving his second term as such clerk. In the year 1871 there was a deficit in the receipts of his office of the sum of $7,917.30; that is, the total receipts of his office fell short by that amount of a sum sufficient to pay his salary and deputy hire. There was, however, remaining in his hands fees earned during his prior term, out of which the court allowed him the sum of $7,917.30 to supply the deficit for the year 1871, which still left a

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balance in his hands, which balance he was, by the court, required to pay into the county treasury. Here the court directly recognized the law to be that the clerk was entitled to receive the maximum allowed by law for his salary; and further, if there is a shortage in one year, such shortage may be supplied out of the fees of a succeeding year, no matter whether such fees were earned in the year wherein the deficit occurred, or not. The same doctrine is declared in *Thornton v. Thomas*, 65 Mo. 272.

III. The facts in each case will determine the conclusion reached by the court. They are the hinge upon which the case will turn. Evans, the appellee, contends that he is entitled to all the fees that he may collect, notwithstanding he expended no labor therefor. Such a construction as contended for by him would not only be illegal, violative of the intention of the law-making power, but grossly inequitable and unjust. Can it be possible that the legislature intended that an incoming clerk should receive and appropriate to his own salary fees earned by his predecessor, when his predecessor had not received the full amount of his annual salary and the successor did nothing save to receive the fees and receipt to the sheriff therefor? No such intention was ever in the legislative mind. If the courts of this country uphold and sustain such a doctrine as that, then let us quote no longer with approval, that higher and better law of the Bible, "The laborer is worthy of his hire."

JOHN H. LUCAS, for the respondent.

I. The demurrer ought to have been sustained upon the grounds following: (1) It appears from the face of the petition that the real party defendant is the county of St. Clair, and defendant herein is only a trustee holding the fees collected for the benefit of the county; and that plaintiff has made a final settlement with the county. *State to use v. Hickman*, 84 Mo. 74. (2) The demurrer ought to have been sustained for the reason that appellant had no interest in the fees of his office after the expiration of his term.

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II. The law does not fix the salary of the clerk of the circuit court at eleven hundred dollars. Section 5627, Revised Statutes, provides "in all counties having a population of ten thousand and less than fifteen thousand persons, the clerks shall be permitted to retain eleven hundred dollars for themselves and be allowed to pay for deputies or assistants not exceeding five hundred dollars." Under this contract appellant accepted the position of clerk of the circuit court, a contract that makes him a trustee for the benefit of the county. He has no interest in the fees except in trust, first, to pay his deputies, second, to pay himself a sum not exceeding eleven hundred dollars, third, to turn the residue into the county treasury. *Thornton v. Thomas*, 65 Mo. 272; *In re Burris*, 66 Mo. 447.

III. If he does not collect his fees during his incumbency, how can it be claimed that he is entitled to that which he never receives? Such a construction as contended for by appellant would enable an officer as long as he retained his position to be careless and indifferent about the collection of fees, and as soon as his successor qualified and he was no longer interested, compel the collection by fee bills, executions, etc., of claims that, while in official position himself, he took no steps and made no efforts to collect for fear of injuring his chances for reëlection.

IV. Respondent's interest in the matter is simply to pay the same into the county treasury under section 5635, Revised Statutes.

ELLISON, J.—This action is by an ex-clerk of the circuit court of St. Clair county against his successor in office. The petition alleges that in each of the years of plaintiff's incumbency the fees earned and collected by him did not amount to the sum allowed him by law as salary, after paying his deputy; and that his settlements with the county court showed this; that he earned $113.05 in fees in suits pending in the circuit court, which had not been collected during his term, but

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were collected by defendant, his successor; that he had demanded these fees of defendant and had been refused by him.

Defendant demurred to the petition as stating no cause of action. The demurrer was sustained and plaintiff refusing to plead further, judgment was entered for defendant.

I am of the opinion that a circuit clerk is entitled to receive of the fees earned by him a sum equal to the amount allowed him by law, although such fees may not be collected during his term and that the clerk receiving them would hold them in trust for this purpose. It seems to be the view of the Supreme Court, as expressed in *Thornton v. Thomas*, 65 Mo. 272, that the fees earned by a clerk belong primarily to the county, and out of which the clerk is allowed by law to retain a certain sum, the amount depending upon the population of his county; that the clerk holds such fees as a trustee for the purposes for which the law has destined them. In that case it was not determined, "whether one of these trusts would be to supply a deficiency in the receipts of a former year to cover expenses and salaries," the facts in that case not calling for a decision of such question. But the question is involved here, and I think the trust would be to supply the deficiency in the ex-clerk's salary. Such view is certainly more consonant with justice and fairness. There can be no public interest subserved in letting money earned by the clerk and which is within the bounds of his salary, go to the county. Such is undoubtedly the proper construction of the statute. A case could well be supposed of a clerk filling a short unexpired term in which all of the fees earned by him would be paid in to his successor. I cannot think that under such state of facts he would get nothing for his services.

The foregoing views do not fully dispose of the case. If the petition fails to state a cause of action, although not for the reason urged in the demurrer, the judgment must be affirmed. The petition does not allege that

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defendant had notice of the deficit in plaintiff's salary; nor does it appear whether defendant had the money in his hands, or had settled with the county court, and for this reason the demurrer was properly sustained.

In order to hold defendant liable, it should be alleged and shown that he had knowingly misapplied the trust fund. If, without knowledge of plaintiff's claim, defendant made his regular settlement with the county court and turned over money collected by him, though earned by plaintiff, he ought not to be held liable; for he cannot be supposed to be aware of the deficit, without some sort of notice to that effect.

The judgment, with the concurrence of the other judges, is affirmed.

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State of Missouri, Respondent, v. Michael Fletchall, Appellant.

Kansas City Court of Appeals, May 23, 1888.

1. Criminal Law—Prosecution by Information—Legislation Concerning Prior to and since 1885.—Prior to the legislation of 1885 (Laws of Mo., 1885, p. 145), it was held that prosecutions by information must be upon the information of the prosecuting attorney, and not at the relation of any private person; and it was further held that the term "information," as employed in the constitution, was used in its common-law sense and import. But the legislature of 1885 amended the statute of 1879 by entirely striking out sections 2025, 2026, 2028, and 2054, of chapter twenty-four, article twenty-three, Revised Statutes, and, in lieu thereof, authorized prosecutions before justices of the peace for misdemeanors by information (providing what it shall set forth) made by the prosecuting attorney, whenever he has knowledge of the commission of any such offence, or shall be informed thereof by complaint lodged with him, etc. But there is nothing in this statute which requires the prosecuting attorney to either set out in the information the sources of his knowledge or to support it by his affidavit.

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2. ——— ——— REQUIREMENT AS TO MAKING, "UNDER OATH OF OFFICE."—The requirement of the statute (Laws of Mo., 1885, *supra*) authorizing the prosecuting attorney to make such informations "under his oath of office" was superfluous, as such officer, while acting in his official capacity, in all prosecutions, is supposed by the law to be acting under his oath of office.

3. PRACTICE—ERROR NOT SET UP IN MOTION FOR NEW TRIAL.—Where the error assigned in this court by appellant is the action of the trial court in denying his application for a continuance, it will not be considered when the error assigned was not set up in his motion for new trial.

APPEAL from Worth Circuit Court, HON. CHAS. H. S. GOODMAN, Judge.

Affirmed.

The case is stated in the opinion.

KELSO & SCHOOLER, MCCULLOUGH & PERRY, and JESSE BENSON, for the appellant.

I. The information is invalid and void, because it is not accompanied by, or based upon, a complaint, as required by law. The prosecuting attorney has no right to file an information unless a complaint shall have been first filed with the justice or deposited with him. Laws of Mo., 1885, p. 145, secs. 2025, 2026. If the prosecuting attorney has personal knowledge of the facts, then he should either file a complaint or verify the information under oath. The mere fact that the information is made "under his oath of office" is not enough; every official act of such officer is done under his oath of office.

II. If sections 2025 and 2026, above referred to, should be construed to authorize the issuance of a warrant for the arrest of a citizen without a complaint supported by oath or affirmation, then they would be clearly repugnant to section eleven, of article two, of the state constitution. The official oath of a public officer is not the oath required by said section of the constitution; that provision evidently refers to an oath or

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affirmation as to the truth of the facts stated in the complaint. The courts will not, therefore, put such construction on said new sections 2025, 2026, as to render them obnoxious to the provisions of the constitution referred to. But even if the prosecuting attorney may file an information on his own personal knowledge, and not based upon a complaint, then assuredly there should be something on the face of the information, or by way of verification to it, to indicate that it is made on the personal knowledge of the officer. The mere statement that he makes it under his oath of office is not sufficient, for, as we have seen, all informations are required to be so made. The information is, therefore, void, and the motions to quash and in arrest should have been sustained. *State v. Shaw*, 26 Mo. App. 383; *State v. Hayward*, 83 Mo. 299. In Texas, under a similar constitutional provision and a similar statute, it has been held that a sworn complaint was a necessary prerequisite to a valid information. *Davis v. State*, 2 Tex. App. 184; *Thornberry v. State*, 3 Tex. App. 36; *Turner v. State*, 3 Tex. App. 551; *Hoerr v. State*, 4 Tex. App. 75; *Johnson v. State*, 4 Tex. App. 594; *Casey v. State*, 5 Tex. App. 462; *Williamson v. State*, 5 Tex. App. 485; *Swink v. State*, 7 Tex. App. 74; *Lanham v. State*, 9 Tex. App. 232; *Scott v. State*, 9 Tex. App. 434; *Smith v. State*, 9 Tex. App. 475; *Rose v. State*, 19 Tex. App. 470. We especially call the attention of the court to the case of *Thornberry v. State*, 3 Tex. App. 36, above cited, which we think is decisive of this case.

III. The court also erred in overruling defendant's application for a continuance, on the prosecuting attorney's agreement to admit that the absent witnesses would testify as therein stated. By making this admission, and thus forcing the defendant to trial without his witnesses, the state waived any informality in the application; and the court in effect ruled the application sufficient, by requiring the state to admit the facts therein stated before overruling the same. In this there was certainly reversible error, as ruled in recent decisions of

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the Supreme Court. *State v. Berkley*, 92 Mo. 41; *State v. Neider*, 6 S. W. Rep. 709. For the errors complained of, we ask that the judgment be reversed and the defendant be discharged.

No brief for the respondent.

PHILIPS, P. J.—The defendant was prosecuted and convicted, on information filed by the prosecuting attorney of Worth county, before a justice of the peace, for exhibiting a certain deadly weapon, to-wit, a pistol, in the presence of one or more persons, in a rude, angry, and threatening manner, etc.

The principal reason assigned by the appellant for reversing the judgment of conviction below is the alleged invalidity of the information. His objection is: (1) because the information is not verified by the affidavit of any person who would be a competent witness to testify therein; and (2) because the information does not show that the prosecuting attorney had any personal knowledge of the facts alleged therein, and the same is not verified by his affidavit. It was held in *State v. Kelm*, 79 Mo. 515, that such prosecutions must be upon the information of the prosecuting attorney, and not at the relation of any private person. It was further held in that case that the term "information", as employed in the constitution, was used in its common-law sense and import. This is the supreme authority of the state, binding upon the courts and the legislature alike. This ruling has been repeatedly followed by the Supreme Court since.

The legislature in 1885 (Laws of Mo., 1885, p. 145), in recognition of and in obedience to this construction of the Supreme Court, amended the statute of 1879, which was the subject of construction, by entirely striking out sections 2025, 2026, 2028, and 2054, of chapter twenty-four, article twenty-three, and in lieu thereof authorized prosecutions before justices of the peace for misdemeanors by information, "which shall set forth

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the offence in plain and concise language, with the name of the person or persons charged therewith. * * * All such informations shall be made by the prosecuting attorney of the county in which the offence may be prosecuted, under his oath of office, and shall be filed with the justice," etc.

There is also another clause of this statute which requires the prosecuting attorney, whenever he has knowledge of the commission of any such offence, or shall be informed thereof by complaint lodged with him, etc., to file the information.

There is nothing in this statute which requires the prosecuting attorney to either set out in the information the sources of his knowledge, or to support it by his affidavit. There is nothing in the constitution making any such requirement, as it (sec. 12, art. 2) merely authorizes prosecutions to be made by indictment or information. And as already stated, the term "information" as thus employed in the constitution must be taken and understood in its common-law meaning and import. At common law, the crown officer was not required to make oath to the information lodged by him, nor to set out his source of information, nor to state that he had personal knowledge of the fact. He did not even have to obtain leave of the court to file the information. And while he usually did it at the prompting of some private person, the information did not make any mention of this fact. Bishop Crim. Proc., secs. 142, 143, 144. The form of such information at common law, as given by this author (sec. 146), contains no such requirement as is contended for by appellant.

The language of our statute (Laws of 1885, *supra*) authorizing the prosecuting attorney to make such informations "under his oath of office" was quite superfluous, as such officer, while acting in his official capacity in all prosecutions, is supposed by the law to be acting under his oath of office. The information filed by him in this case is quite formal, and employs the statutory requirement, "under his oath of office." The statute

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itself, also, in stating what the information shall contain, simply requires that it "shall set forth the offence in plain and concise language, with the name of the person or persons charged therewith." So the information attacked is in conformity with the essential requirements both of the common law and the statute.

The rulings of the court of appeals of the state of Texas, based upon her constitution and statutes, cannot control here. Our own constitution, as interpreted by the Supreme Court of this state, must be our guide. It does not appear from the cases cited from that jurisdiction that Texas has the same provision in her constitution as that of section twelve, article two, of our state constitution. As held by our Supreme Court, the term information as employed here being the same as at common law, we must look to the common law for its meaning. In Texas the common law of England does not obtain, except in so far as she may adopt it by legislative enactment. *Flato v. Mulhall*, 72 Mo. 525. As by the express provision of our constitution (sec. 12, art. 2), in case of prosecution for misdemeanors, indictment and information are concurrent remedies, there is no more reason for saying that the proceeding by information according to the common-law form is not due process of law, than for saying an indictment is not such, because the warrant of arrest was not supported by oath or affidavit reduced to writing, as provided for in section eleven, article two, of our constitution. The very fact that the succeeding section (sec. 12) proceeds to deal with the subject of prosecutions by indictment and information, shows conclusively that in the minds of the framers of our organic law the provisions of section eleven referred to an entirely different and distinct subject-matter. The objection is overruled.

II. The other error assigned by the appellant is the action of the court in denying his application for a continuance. We are precluded from considering this objection, for the reason that defendant did not set up such error in his motion for new trial. *State v. Mann*,

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83 Mo. 589; *State v. Ray*, 53 Mo. 345; *State v. Blau*, 69 Mo. 317; *State v. Burk*, 89 Mo. 635; *Hatcher v. Moore*, 51 Mo. 115; *McCoy v. Farmer*, 65 Mo. 244; *Griffin v. Regan*, 79 Mo. 73; *State ex rel. v. Burckhartt*, 83 Mo. 430.

The judgment of the circuit court is affirmed. All concur.

STATE OF MISSOURI, Respondent, v. DANIEL HUIATT, Appellant.

Kansas City Court of Appeals, May 23, 1888.

1. CRIMINAL LAW—PROSECUTION UNDER INFORMATION, ETC.—COSTS—CONSTRUCTION OF SECTION 1768, REVISED STATUTES — CASE ADJUDGED.—Under section 1768, Revised Statutes, the prosecuting witness is made liable for the costs in the event of an acquittal only in cases "in which, by law, an indictment is required to be indorsed by a prosecutor." The instance in which such indorsement is required is that of indictment for any trespass against the person or property of another not amounting to felony; the prosecution, in this case, is not of this character.

2. —— —— SECTION 2095, REVISED STATUTES.—Section 2095, Revised Statutes, which prescribes that every person who shall institute any prosecution to recover a fine, penalty, or forfeiture shall be adjudged to pay costs, if the defendant be acquitted, etc., has no application here. An indictment against an officer such as a justice of the peace and constable, for an offence in the administration of justice, need not be indorsed with the name of a prosecutor. The policy of the law, in the case of a personal grievance, is not applicable to public officers.

APPEAL from Holt Circuit Court, HON. C. A. ANTHONY, Judge.

Reversed.

The case is stated in the opinion.

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SAMUEL O'FALLON, for the appellant.

I. The prosecuting witness is not liable for costs, when the prosecution fails, from any cause, unless the offence charged is a trespass against the person or property of another. Rev. Stat., secs. 1768, 1800; Appendix to Kelley's Crim. Law [1880] sec. 279. p. 124. Had this prosecution been by indictment, no prosecutor would have been necessary, and in misdemeanor cases when the indictment is not required to be endorsed by a prosecutor, the county is liable for costs. And the same rule applies to informations. Rev. Stat., secs. 1768, 1800, 2095; *State v. Allen*, 22 Mo. 318; Appendix to Kelley's Crim. Law, sec. 27; Kelley's Crim. Law, sec. 158.

II. The statute relating to costs should be strictly construed and unless the witness was liable under the statute, the court had no authority to adjudge the costs against him. The court may have the power to tax costs at discretion on continuances, etc., but when the defendant is acquitted the cost is determined by statute. Section 2096 has reference to fines, penalties and forfeitures, under statutes not strictly of a criminal character and does not apply to this class of cases. Appendix to Kelley's Crim. Law, sec. 279, p. 125; *State v. Louelle*, 78 Mo. 104.

III. There are three modes of procedure in criminal cases of this class—by indictment, information in the circuit court, and information before a justice of the peace. There can be no question, that had this prosecution been by indictment, no prosecutor would have been required, and when the prosecution failed the county would have been liable for the costs, and had it been by information before a justice, the prosecuting witness could not have been liable for costs unless the prosecution was found to have been malicious. The legislature certainly intended to make liability for costs in criminal cases uniform under each mode of procedure; the prosecuting witness under each is liable in cases of trespass against

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the person or property of another, except petit larceny; and in no other case is he liable. In all offences of a public nature, the state or county is liable for all costs.

T. C. DUNCAN and H. T. ALKIRE, for the respondent.

I. The sole point presented for the decision of this court in this case is, whether a prosecuting witness in a case instituted in the circuit court by information based upon an affidavit of such prosecuting witness filed with the circuit clerk, is liable for the costs accruing in such cause where the defendant is acquitted.

II. There are two methods of instituting prosecutions for misdemeanors in the circuit court: (1) By indictment of a grand jury; (2) by information verified by prosecuting attorney; or, some person competent to testify as a witness in the case; or by information supported by the affidavit of a person competent to testify as a witness in the case. Rev. Stat., secs. 1761, 1762.

III. Prosecutions for misdemeanors instituted by indictment are governed by the general law concerning indictments, and costs must be taxed and adjudged under the provisions thereof. Rev. Stat., secs. 1800, 2092, 2101.

IV. Prosecutions for misdemeanors instituted by information are governed by the information act, and costs must be taxed and adjudged under the specific provisions thereof when the same are sufficiently explicit and clear. Rev. Stat., art. 14, sec. 1768.

V. The prosecuting witness, if there be one, is liable for all costs in the case when the prosecution fails from any cause, or when the defendant shall be acquitted, unless the same or some part thereof has already been otherwise adjudged by the court. Rev. Stat., sec. 1768; *State v. Brigham*, 63 Mo. 258; *State ex rel. v. Holladay*, 67 Mo. 299; *State v. Lavelle*, 78 Mo. 104.

VI. In no case is the endorsement of a prosecutor on an information necessary, not even for trespass against person or property under section 1800, Revised Statutes.

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VII. Under section 2095, Revised Statutes, the county in this case is within the exception of that section.

VIII. The defendant is the prosecuting witness under section 1768, Revised Statutes, and is liable to pay costs under it. Rev. Stat., sec. 2101.

IX. And the circuit court did not err in sustaining the motion and entering a *nunc pro tunc* order and judgment against said prosecuting witness for the costs in said cause, the facts alleged in the motion being admitted as true and of record in said cause.

X. A prosecuting witness and a prosecutor are not necessarily one and the same person in the law; although a prosecuting witness may become and be deemed a prosecutor. A distinction is almost invariably made and kept up, throughout the Revised Statutes of 1879 and the acts amendatory thereto. Rev. Stat., secs. 1768, 1800, 1801, 2095, 2098, 2099, 2100, 2101.

XI. The laws, as originally passed in relation to prosecution of misdemeanors before justices of the peace and the acts amendatory thereto, and the provisions thereof, as to costs, prosecuting witnesses or prosecutors, have nothing whatever to do with the case at bar.

PHILIPS, P. J.—In May, 1881, William A. Gardner filed with the clerk of the Holt circuit court an affidavit, charging that Daniel Huiatt *et al.*, justices of the county court of that county, had unlawfully and corruptly granted and issued to one Kyger a dram-shop license, without the necessary petition therefor. On this affidavit the prosecuting attorney of the county filed an information against said justices for such offence. On trial defendants were acquitted; and the circuit court has since assessed the costs of this prosecution against said Gardner as the prosecutor, and rendered judgment accordingly.

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The single question presented by this record, necessary to be decided, is, whether or not Gardner, by making such affidavit, became liable for the costs of the prosecution in the event of the acquittal of the accused.

It seems to be conceded by respondent that the authority for the action of the court is based upon section 1768, Revised Statutes, which declares that: "When the information is based on an affidavit filed with the clerk, or delivered to the prosecuting attorney, etc., the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which, by law, an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness shall be liable for the costs in the case, not otherwise adjudged by the court; but the prosecuting attorney shall not be liable for costs in any case."

It is to be observed and kept in mind that while this section makes the prosecuting witness liable for the costs in the event of an acquittal, it is only in cases in "which, by law, an indictment is required to be indorsed by a prosecutor." The instance in which an indictment is required to be indorsed with the name of the prosecutor is section 1800, Revised Statutes, which declares that an indictment for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, shall be indorsed with the name of the prosecutor. The prosecution in question not being for any trespass against the person or property of the informer Gardner, had it been instituted by indictment, the name of the prosecutor would not have been required to be indorsed on it. As the above section is the only instance in which the name of the informer is required to be indorsed, applicable to this case, we fail to find any warrant for the action of the circuit court in assessing the costs against Gardner.

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Section 2095, Revised Statutes, which prescribes that every person who shall institute any prosecution to recover a fine, penalty, or forfeiture, shall be adjudged to pay costs, if the defendant be acquitted, etc., has no application to this case. *State v. Lavelle*, 88 Mo. 104. It has been held directly that an indictment against an officer, such as a justice of the peace and constable, for an offence in the administration of justice, need not be indorsed with the name of a prosecutor. *State v. Dickerson*, 24 Mo. 368; *State v. Allen*, 22 Mo. 318. The character of the offence charged in this case against such important judicial officers as justices of the county court, in the administration of justice, so much concerns the public welfare that it is to be presumed, when the prosecuting attorney for the county lends his name to the prosecution by information, the legislature did not intend to lay the burden upon the informer of paying the costs in case of failure of prosecution. And as the informer, presumably, would be actuated in such instance only by a sense of duty to the public welfare, the policy of the law in making him responsible for the costs, as in the case of a personal grievance, does not exist.

The other judges concurring, the judgment of the circuit court is reversed.

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STATE OF MISSOURI, Respondent, v. THOMAS G. BRADLEY, Appellant.

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Kansas City Court of Appeals, May 23, 1888.

1. JURISDICTION—ENFORCEMENT OF PENALTY FOR OBSTRUCTING PUBLIC ROAD—CONSTRUCTION OF SECTION 6964, REVISED STATUTES. Under section 6964, Revised Statutes, providing for the enforcement of the penalty against the offence of obstructing a public road, and under the terms of sections 1760 and 1761, Revised Statutes, conferring jurisdiction in cases of misdemeanor, the remedy provided by the statute is concurrent; and the remedy provided in a justice's court is not exclusive, so as to take away jurisdiction from circuit courts, and the statute provisions are in conformity with the constitution of this state.

2. PRACTICE—LIMITATION—CASE ADJUDGED.—Where, as in this case, the evidence clearly shows that the obstruction was continued by the defendant, and existed on the day alleged in the information,—a day within the year next preceding the filing of the information—this was sufficient to sustain the prosecution. It was not necessary, in such case, that the information should have contained a *continuando* as in case of a prosecution for levying a nuisance sought to be abated.

3. PUBLIC ROAD—WHEN SO CONSTITUTED BY USER—RULE CONCERNING IN THIS STATE.—A road may become a public highway by user, for the obstruction of which a prosecution will lie. It is no longer an open question in this state that the continued use of a road by the public for a period of ten years, will constitute it a public road, for the obstruction of which the offender may be proceeded against criminally. (*State v. Proctor*, 90 Mo. 334.)

4. PRACTICE—INSTRUCTIONS—INCONSISTENCY—CASE ADJUDGED.—There is no inconsistency between instructions, which on the one hand require a user to be shown, and on the other explain the character of the user referred to in the first instance. Nor is there any valid objection to the words "wilfully" and "knowingly," as used in the instructions in this case.

APPEAL from Johnson Criminal Court, HON. JOHN E. RYLAND, Judge.

Affirmed.

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The case is stated in the opinion.

SAMUEL P. SPARKS, for the appellant.

I. This proceeding was bottomed on the following section of the Revised Statutes of Missouri: "If any person shall wilfully or knowingly obstruct any public road * * * he or they shall each pay a fine of not less than twenty dollars, to be recovered by indictment or information before a justice of the peace." Rev. Stat., 1879, sec. 6964; Laws 1883, sec. 33, p. 165; Laws 1887, sec. 36, p. 254. (*a*) It is plain that the statute did not provide for a proceeding by information in the criminal court, but only before a justice of the peace. (*b*) This being a statutory offence, the proceedings must be in the tribunal prescribed by the statute, and the criminal court could only try defendant upon an indictment; and the attempted conviction upon an information was a nullity, and this appearing upon the face of the proceedings, the criminal court had no jurisdiction of the offence, and the judgment should be reversed and the defendant discharged. *Journey v. State*, 1 Mo. 428; *Corwin v. State*, 4 Mo. 609; *State v. Huffsmidt*, 47 Mo. 72; *Ex parte Slater*, 72 Mo. 102. (*c*) Want of jurisdiction over the subject-matter can be taken advantage of at any time. *Henderson v. Henderson*, 55 Mo. 534; *Graves v. McHugh*, 58 Mo. 499.

II. All the testimony conclusively established that the acts constituting the alleged offence were committed more than a year prior to the filing of the information, and that the offence was barred. Rev. Stat., sec. 1705.

III. The description of the alleged public road was unintelligible, and the road could not be identified by the description. A criminal charge is bad which fails to inform defendant of the nature of the offence. Const. Mo., art. 2, sec. 22; *State v. Gabriel*, 88 Mo. 631.

IV. Before the highway could have been acquired by user alone, it was essential that such use should have

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been continuous and uninterrupted for the requisite period of time, as declared in defendant's instruction. This ingredient was ignored in the instructions given for the state, which were in conflict with defendant's instruction. *State v. Culver*, 65 Mo. 607. The owner cannot be deprived of the use of his land by user in the public for a highway short of the period of twenty years, except when the road has been ordered opened by a competent authority, and been used by the public continuously and uninterruptedly for the full period of ten years. *State v. Culver, supra;* Laws 1883, sec. 58, p. 170; Laws 1887, sec. 57, p. 257.

V. The penalty of this statute is only denounced against obstructors of roads legally established by or ordered opened by some competent authority.

VI. The definition of the words "wilfully" and "knowingly," contained in the eighth instruction for the state, was erroneous. The word "wilfully," as employed in this statute, means legal malice or evil intent, the absence of reasonable ground for belief that the act charged was unlawful, not merely intentional, as declared by this instruction. In penal and criminal statutes, it means that the act was done wrongfully. *Schubert v. State*, 16 Tex. App. 648; *Trice v. State*, 17 Tex. App. 43; *Brinkoeter v. State*, 14 Tex. App. 67; *Thomas v. State*, 14 Tex. App. 200; *State v. Preston*, 34 Wis. 675; 1 Bish. Crim. Law, sec. 421; *State v. Abram*, 10 Ala. 928; *McManus v. State*, 36 Ala. 285; *Commonwealth v. Kneeland*, 20 Pick. 206, 220; *Commonwealth v. Bradford*, 9 Met. 268. The definition of the word "knowingly," in the same instruction, was erroneous and misleading, and would authorize a conviction, though the defendant was actually ignorant of the existence of the road.

VII. The fifth instruction for the state made the offence a continuing one. There was no *continuando* charged in the information. Though it were a continuing offence, without this the instruction was erroneous. 1 Bish. Crim. Proc., secs. 393, 394, 395, 396.

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VIII. The seventh instruction for the state was vicious, in telling the jury that, because the defendant had testified in his own behalf, they should consider this fact in determining his credibility.

IX. The fourth instruction of defendant, refused by the court, correctly declared the law.

X. The court erred in refusing the fifth instruction of defendant; by so doing, it declares that it was not necessary that the indictment read in evidence should be for the identical offence charged in the information to suspend the running of the statute during its pendency.

XI. The court erred in admitting oral testimony tending to show the existence of a public road, and to make out the offence, in view of instruction numbered two, given for defendant, declaring a legally established public road on the line, just as defendant contends, and upon the faith of which he erected his fence twenty feet north of that line.

B. G. BOONE, Attorney General, R. M. ROBERTSON, Prosecuting Attorney, and W. W. WOOD, for the respondent.

I. The section of the road law, under which the information in this case was filed, was first enacted in 1877. Acts 1877, p. 401. When a former provision is contained in a revised law, it operates only as a continuance of its existence, and not as an original act. *Cape Girardeau v. Riley*, 56 Mo. 424; *State ex rel. v. Heidorn*, 74 Mo. 410. The law as to jurisdiction was enacted in 1879, and being the later act repeals the above section of the road law to the extent that it conflicts with the same. Rev. Stat., 1879, sec. 1761. A fine, penalty, or forfeiture may be recovered by information or indictment, notwithstanding another, or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty, or forfeiture. Rev. Stat., 1879, sec. 1674. An information in a road obstruction case, filed after the law of 1877 (which is the same on that point as the road law of

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1883) went into effect, held good. *State v. McCrary*, 74 Mo. 303.

II. We think it clear from the face of the indictment offered in evidence that the road described therein was the same as the road described in the information. The proof offered by the state furnished abundant evidence from which the jury might have found that the offence charged in the indictment and that charged in the information, were one and the same; and that being the case, the statute of limitations did not run. Rev. Stat., sec. 1707; *State v. Primm*, 61 Mo. 166; *State v. Owens*, 78 Mo. 376; *State v. English*, 2 Mo. 182.

III. The instructions given for defendant and those given for the state are not in conflict, nor inconsistent with each other. Taken together, the jury could not have been misled by them.

IV. As to the point that use for twenty years is necessary, "except when the road has been ordered by competent authority," etc., we have only to cite the following: Rev. Stat., 1879, sec. 6981; *State v. Walters*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334.

V. In answer to defendant's array of "foreign" authorities on the definition of the word "wilfully," we cite the following Missouri cases, to which many more might be added. *State v. Talbott*, 73 Mo. 350; *State v. Thomas*, 78 Mo. 327; *State v. Brooks*, 92 Mo. 553. The definition of the word "knowingly," in this class of cases, is fully substantiated by *State v. Wells*, 70 Mo. 635.

VI. If the information had charged the commission of the offence on a date more than one year before the filing of the information, undoubtedly it would have been necessary to allege a *continuando*, but as the offence was charged to have been committed within a year, it was unnecessary. *State v. Gilbert*, 73 Mo. 20; *State v. Meyers*, 68 Mo. 266; *State v. English*, 2 Mo. 182.

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VII. The fourth instruction for defendant was properly refused. "It makes not the slightest difference in this case whether defendant had any knowledge of the fact that the road was legally established or not." *State v. Wells*, 70 Mo. 635; *State v. Julian*, 25 Mo. App. 137. The fifth instruction was properly refused. It ignored the evidence tending to show that the offence was a continuous one. *State v. Gilbert*, 73 Mo. 20.

VIII. Appellant's eleventh point is fully answered by the authorities cited under our fourth paragraph.

SAM'L. P. SPARKS, in reply.

I. The contention of respondent that section 1761 repeals by implication section 6964 is without foundation. The former expressly provides: "All misdemeanors shall be prosecuted by indictment or by information in the court having jurisdiction thereof." How can a repeal of the special jurisdiction confined to justices of the peace of this sort of action be predicated of this language? Repeals by implication are never allowed unless the two acts are so inconsistent that they are repugnant—wholly irreconcilable—so inconsistent as not to stand together. *Glasgow v. Lindell*, 50 Mo. 60; *McVey v. McVey*, 51 Mo. 406; *Railroad v. Cass Co.*, 53 Mo. 17; *State v. Debar*, 53 Mo. 395; *State v. Jaeger*, 63 Mo. 403.

II. Section 1674 is a provision wholly concerning the remedy; does not in the least affect the special jurisdiction provided for in section 1761; is not *in pari materia*. This section (striking out the words "or information" interpolated in the revision of 1879) has been on the statute books since the revision of 1855. Rev. Stat., 1855, sec. 33.

III. The case of *State v. McCrary*, 74 Mo. 303, cited as an authority under the proposition that the criminal court had concurrent jurisdiction with justices of the peace of this offence by information, is not in point—the offence in that case was charged to have been committed on May 1, 1877, only two days after the

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approval of the act containing section 6964, and it is fair to presume that the trial court had not been informed of the provision of the statute, nor was the jurisdictional question here raised called to the attention or passed upon by the court, but was passed "by *sub silentio*, and with an 'upturned eye.'"

PHILIPS, P. J.—The defendant was, on information, convicted for obstructing a public road in Johnson county, and from the fine assessed he has appealed.

I. His first contention is, that the proceeding by information for this offence is restricted solely to a prosecution instituted in a justice's court. This proposition is based upon a technical construction of the language of the statute (Laws 1883, sec. 33, p. 165) on which the prosecution is based. It declares that for such offence the offender shall pay a fine of not less than twenty dollars, "to be recovered by indictment or by information before a justice of the peace."

This statute was first enacted in 1877. Laws Mo. 1877, p. 401, sec. 34. It was afterwards imported into the revision of 1879 (vol. 2, sec. 6964). Prior to this act of 1877 the corresponding provision in the road law, denouncing the offence of obstructing a public road, made no provision as to the manner of enforcing the penalty. Gen. Stat., 1865, sec. 45, pp. 295, 296. The mode of its enforcement was prescribed in section 30, page 828, General Statutes, 1865, which provided that whenever a fine, penalty, etc., is or may be inflicted by any statute for any offence, the same may be recovered by indictment, notwithstanding another or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty, etc. At the time of the enactment of the provisions in the statute of 1865 the constitution did not permit such prosecutions by information. Const., 1865, sec. 24, art. 1. But the constitution of 1875 (sec. 12, art. 2) authorized such offence to "be prosecuted criminally by indictment or *information* as concurrent remedies.'

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By section 1760, Revised Statutes, it is provided that: "Except as otherwise provided by law, the circuit court shall have exclusive original jurisdiction in all cases of felony, and concurrent original jurisdiction with, and appellate jurisdiction from, justices of the peace, * * * in all cases of misdemeanor."

The following section (sec. 1761) provides that "all misdemeanors shall be prosecuted by indictment or by information in the courts having jurisdiction thereof. But that mode of procedure which shall first be instituted by the filing of the indictment or information for any offence, shall be pursued to the exclusion of the other, so long as the same shall be pending and undetermined; and the court in which the prosecution shall be first commenced * * * shall retain jurisdiction and control of the cause to the exclusion of any other court, so long as the same shall be pending and undisposed of."

By special act creating the criminal court for Johnson county (Laws Mo., 1875, p. 42), the same jurisdiction is conferred on it, in criminal matters, as by general statute on the circuit courts. This is one of the exceptions "as otherwise provided", within the terms of section 1760. By this section concurrent original jurisdiction with justices of the peace "in all cases of misdemeanor" is expressly conferred on the circuit court; and by section 1761 "all misdemeanors shall be prosecuted by indictment or by information in the courts having jurisdiction thereof."

Said section thirty-four of the act of 1877 being carried into the revision of 1879 should, if possible, be made to harmonize with the general provisions of sections 1760 and 1761. If the language of section thirty-three, act of 1883 (Rev. Stat., 1879, sec. 6964) is to be literally construed, it would require that proceedings by indictment should be limited to justice's courts as well as proceedings by information. The language and punctuation are, "to be recovered by indictment or by information, before a justice of the peace." The result of the logic of appellant's contention, that the legislature having

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provided a remedy in the statute creating the offence it is exclusive of every other remedy, would be that such offenders could not be prosecuted at all by indictment, as justices of the peace have no jurisdiction to proceed by indictment. It is unreasonable to conclude that the legislature intended to authorize the proceeding by indictment before a justice of the peace. It is equally untenable to conclude from the language employed that it was in the mind of the framer of the statute to provide an exclusive remedy in a justice's court. No sufficient reason therefor occurs to my mind. Why should it have been designed or desired by the legislature to take away from the circuit courts jurisdiction by information when the constitution declared the remedies by indictment and information to be concurrent, and when jurisdiction by indictment could alone be exercised by the circuit court?

There is the less difficulty in this matter, when it is stated, that the very legislature which enacted the road law of 1877 had, just ten days prior to its passage, declared that, "hereafter circuit courts and justices of the peace shall have concurrent jurisdiction in all cases of misdemeanors, except in cities having courts of exclusive criminal jurisdiction." Laws Mo. 1877, p. 281. The framer of the road law is to be presumed to have had in his mind this prior enactment; and it is not reasonable to conclude that he designed to take away the general jurisdiction conferred by the provisions above quoted over this special misdemeanor, by merely conferring jurisdiction on a justice of the peace to proceed by information. So when the legislature made the revision in 1879, discovering perhaps the state of the statute respecting prosecutions of misdemeanors alone by indictment, they put in the amendment in section 1761, authorizing prosecutions by information in the circuit courts. As the two statutes now stand, the provision in the road law authorizing prosecutions before a justice of the peace by information, and in like manner

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in the circuit courts under the general provision respecting all misdemeanors, are perfectly consistent, as concurrent remedies; with the reservation that the court first acquiring jurisdiction by information shall hold it to the exclusion of the other. In the case of *State v. McCrary*, 74 Mo. 303, the right to proceed by information for this offence in the circuit court passed unchallenged. It is suggested by appellant's counsel, that the offence there was alleged to have been committed on the first day of May, 1877, which was shortly after the act of 1877 was adopted, and before it had gone into effect under the ninety days' rule. But as the proceeding by information applies only to the remedy, the presumption is that the information was not lodged until after the road law of 1877 had gone into effect, when it was permissible to proceed by information, although such remedy did not exist at the time the offence was committed. This must be so, as without the act of 1877 there was no statutory provision for proceeding by information. It is not to be presumed that the Supreme Court overlooked, in the consideration of the appeal therein, so important a question as that underlying the very jurisdiction of the court which convicted the defendant.

II. It is next contended by appellant that the evidence showed the offence, if any, was committed more than one year prior to the filing of the information, and, therefore, the prosecution is barred. Rev. Stat., sec. 1705. The state sought to remove this objection by putting in evidence the record of a former indictment for this offence, in which the state had entered a *nol. pros.* on the same day on which the information was made. To this defendant interposed the objection that on its face it did not sufficiently appear that the indictment was for the same offence, and there was no proof offered by the state *aliunde* to so identify the two prosecutions. We do not deem it necessary to determine this issue of fact, as the evidence clearly shows that the obstruction was continued by the defendant, and existed on the day

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alleged in the information, a day within the year next preceding the filing of the information. This was sufficient to maintain the prosecution. *State v. Gilbert*, 73 Mo. 21. It was not necessary, in such case, that the information should have contained a *continuando*, as in case of a prosecution for levying a nuisance sought to be abated. 1 Bish. Crim. Proc., sec. 397, last paragraph.

III. It is further contended that the denunciation of the statute is against the obstruction of a road legally established by some competent authority, and not of a road constituted by user. This is based upon the concluding clause of said section thirty-three of the road law, "and upon trial of any such indictment or information, it shall only be necessary for the prosecution to prove that such road has been established by order of the county court, and the same had been used as a public road."

This by no means limits the offence to the instance of a road created and opened by order of court. Its meaning is, that in a case where the prosecution relies upon the fact of a road created by court, it shall only be necessary to prove the enumerated facts. It was not designed to affect the established rule of law in this state, that a road may become a public highway by user, for the obstruction of which a prosecution will lie. It can no longer be regarded as an open question in this state, that the continued use of a road by the public for a period of ten years will constitute it a public road, for the obstruction of which the offender may be proceeded against criminally. *State v. Walter*, 69 Mo. 463; *State v. Wells*, 70 Mo. 635; *State v. Proctor*, 90 Mo. 334. There was sufficient evidence of such user in this case to support the verdict, although there was evidence on the part of defendant from which a different conclusion might possibly have been reached by the jury. Their conclusion on a disputed question of fact is binding on the court.

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IV. Criticism is made of the instructions given on behalf of the state, in that they did not require that such *user* should have been continuous.

The first instruction required the jury to find that the point of the road in controversy had been used and traveled as such by the public, and had been claimed and recognized, used, worked, and repaired when necessary as a public road for a period of ten years or more. This instruction was approved by the Supreme Court in *State v. Walter*, *supra*. And if there could be any question as to what the jury must have understood by it, in the particular complained of, there can be little ground of doubt when it is read in connection with the other instructions in the case. The eighth instruction given for the state required the jury to find that the road had been opened and used by the public as a road for ten years *consecutively*. And, on the part of the defendant, the court directed the jury as follows:

"1. The court instructs the jury that before they can find the defendant guilty of an obstruction of a public road established and acquired by user alone, you must find that the part so obstructed was actually used continuously by the public generally without interruption or intermission for a definite period of time for the full period of ten years before the date of the alleged obstruction, and the burden of so establishing rests upon the state, and unless it has so affirmatively established, you should acquit."

"2. The court instructs the jury that there was a legally established road on and along the line dividing the lands described in the evidence as the lands of Starkey and Fulkerson, and that the public could not acquire a public road by user, by occasionally, in the use of said public road, departing from that public road on to the adjoining premises unless such departure and travel was kept up continuously without interruption or intermission for the definite period of time for the full period of ten years."

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There is no possible inconsistency between these declarations and those given for the state, those for the defence merely explaining the character of the ten years' use required in the first.

V. The following instruction is objected to:

"The word 'wilful,' as used in the information, means that the act was done intentionally, and not accidentally. By the word 'knowingly,' is meant that the defendant knew that the act as done would obstruct or lessen the facilities for travel; and if the jury find from the evidence that the road had been a legally established public road, by use for ten years or more, and that the defendant obstructed the same in the manner alleged, then they will find him guilty, although they may further find that he had no knowledge that the road had been a legally established public road by use for ten years or more, and that the defendant obstructed the same in the manner alleged, then they will find him guilty; although they may further find that he had no knowledge that the road had been legally established."

The first criticism is made of the definition given to the words "wilfully" and "knowingly." It is contended that the word "wilfully," as employed in this statute, implies legal malice, and evil intent. This word, as employed in indictments for graver offences, such as homicide, has acquired a well-defined meaning in our practice, which accords with that given by this instruction. *State v. Talbott*, 73 Mo. 350; *State v. Thomas*, 78 Mo. 333; *State v. Brooks*, 92 Mo. 553. We perceive no good reason why the legislature in this statute, respecting a mere misdemeanor, should have employed this term in any more enlarged sense than the one long accepted by our courts. The element of malice, or evil intent, is not essential under this statute. *State v. Wells*, 70 Mo. 635; 2 Bish. Crim. Proc., 42, 43; *Harrison v. State*, 37 Ala. 156. Nor do we think the definition given to the word "knowingly," and what is said of the defendant's knowledge, in this instruction, are objectionable. In *State v. Wells*, 70 Mo. 638, SHERWOOD, C. J., said: "It

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makes not the slightest difference in this case whether the defendant had any knowledge of the fact that the road was legally established or not. The offence with which he was charged is a misdemeanor, and in that class of offences the intent which prompts the act possesses no significance."

VI. Other objections are raised by appellant, but they are not of sufficient merit to affect the result, or to justify further discussion. The case appears to have been well and fairly tried.

The judgment is affirmed. All concur.

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DAVID C. IMBODEN, Appellant, v. DETROIT FIRE AND MARINE INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, May 23, 1888.

1. CONTRACTS—POLICY OF INSURANCE—DURATION OF RISK—CASE ADJUDGED.—Conceding that in contracts of insurance the duration of the risk must be agreed upon, it need be so, only in a legal sense. And if the agreement between the parties was (as in this case), that the insurance should determine at a time when the insurer might elect that it should end and to insert the date left blank for that purpose, this is sufficient, since they agree to the mode and manner of fixing the time. Though subject, by its terms, to be terminated by either party, a contract is not thereby invalid.

2. ——— ——— ESTOPPEL.—The validity of a contract may be so far recognized by the other party to it, that such acts may operate so as to create an estoppel—especially if something is done on the faith of such recognition.

APPEAL from Jackson Circuit Court, HON. JAMES H. SLOVER, Judge.

Reversed and remanded.

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The case is stated in the opinion.

DOBSON, DOUGLASS & TRIMBLE, for the appellant.

I. It may be conceded that an agreement as to the time the risk is to run is necessary to a valid contract of insurance. The agreement that the risk should run from the first day of August, 1885, to a day to be named by the defendant, is in law an agreement as to the duration of the risk; and is equivalent in law to a contract for a certain time, because under the terms of the agreement the time can be rendered certain,—*id certum est quod certum reddi potest.* 1 Wash Real Prop. [3 Ed.] 388; Tiedeman Real Prop., sec. 173; *West Trans. Co. v. Lansing*, 49 N. Y. 507, 508; *Church v. Ins. Co.*, 19 N. Y. 305; *Stilwell v. Craig*, 58 Mo. 28, 30. The case of *Strohn v. Ins. Co.*, 37 Wis. 625, so much relied on by respondent, is clearly distinguished from the one at bar by the following language contained in the opinion: "And the witness closed his testimony with the statement that there was nothing said between me and Dearborn as to how long this insurance should run. * * * The amount of premium to be paid and the continuance of the risk are not agreed upon, nor is there any stipulation in the agreement from which these important elements of the contract could be fixed and determined. * * * Perhaps a contract which either party could terminate at any time might be a valid contract," etc. In the case at bar there was something said as to how long the insurance should run. And there is a stipulation in the agreement from which this important element can be fixed and determined.

II. Under the circumstances of this case, and owing to the uncertainty as to how long the grain might remain in the elevator, would it not be a reasonable construction of this contract to say that it was in effect a contract to insure the grain so long as it remained in the elevator, unless sooner terminated by the defendant? If so, then the contract would be valid, just as

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marine risks are valid which are made to continue during the voyage. All that is necessary is that the minds of the parties meet on a certain time; or upon something which is capable of rendering the time certain; or upon means by which the time may be afterwards fixed. *Eames v. Ins. Co.*, 4 Otto [U. S.] 621.

III. Plaintiff could have proved a custom or usage to insure such property for an indefinite time, etc., and that certificates like this were issued as evidence of such insurance. Such evidence would have supplied the apparent defect in the certificate and given effect to the intention of the parties. *Baxter v. Ins. Co.*, 13 Allen [Mass.] 390; Wood on Fire Ins., sec. 20; Clarke & Brown on Usages and Customs, sec. 138; *Rugley v. Goodlee*, 7 La. Ann. 295.

IV. The certificate of insurance in this case, being manifestly incomplete, the plaintiff should have been allowed, on a trial of the facts, to prove that there was an agreement outside of the certificate as to how the risk should be terminated. *Moss v. Green*, 41 Mo. 389; *Lash v. Plasten*, 78 Mo. 397; *Winn v. Chamberlin*, 32 Vt. 318; *Webster v. Hodgkins*, 25 N. H. 128.

V. Five months after this contract was made and the certificate issued, the defendants, with full knowledge that its duration had not been fixed and with full knowledge that the plaintiff was relying upon it as a valid insurance, demanded and received the premium earned up to that time and left the risk to continue as before. The defendant having thus deliberately asserted that this contract was good enough to collect a premium on, should be estopped to deny that it was good enough to pay a loss on. A party cannot occupy inconsistent positions; he will be confined to that which he first adopts. Bigelow on Estoppel, 578, and authorities cited; *Green v. Railroad*, 82 Mo. 653; *Adair v. Adair*, 78 Mo. 630; *Hayward v. Ins. Co.*, 52 Mo. 181; *Wood v. Seeley*, 32 N. Y. 105; *Gas Co. v. St. Louis*, 46 Mo. 121. A party, by actively affirming a contract, as by receiving money upon it, is estopped thereafter to deny its validity.

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Bigelow on Estoppel, 584; *Ran v. Little Rock*, 34 Ark. 312.

VI. If the court should hold that the contract sued on is valid, or that defendant is estopped to deny its validity, but should be of opinion that the petition is otherwise defective, the case should be remanded, with leave to amend.

KARNES & KRAUTHOFF, for the respondent.

I. The law has prescribed certain elements as essential to a valid and complete contract of insurance, and unless these elements are present, it cannot be said that there has been that meeting of minds necessary to constitute a contract. These elements have been enumerated by our Supreme Court as follows: "The reception of and receipt for the required premium; the subject-matter insured; the amount of insurance, and the duration of the policy." *Baile v. Ins. Co.*, 73 Mo. 371, 383. It will be remembered that the present is not a case where the company is retaining the premium and insisting that its policy is void, for the petition admits that no premium has been paid for the period within which the loss is claimed to have occurred. These same elements are universally held to be essential. There is no diversity in adjudged cases nor in the text-books on the subject. Mr. Wood states the law thus: "In this class of contracts, as in all others, the contract must be definite and certain, and the parties must have agreed upon all its essential terms. If anything has been left open, no contract exists, because the minds of the parties have not met, and there is not an agreement that can be enforced by either party, and both parties must be bound. The contract must be complete and perfect. All its elements must be agreed upon, and if anything is left open or undetermined, so that the minds of the parties have not met, no contract exists, and consequently no liability for a loss occurring. As if * * * the duration of the risk is not agreed upon * * * a recovery will not be permitted, as the assured takes

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the burden of establishing all the elements requisite to make a complete contract. The *aggregatio mentium* must be fully established. * * * The details of the contract must be fixed." Wood on Fire Ins., pp. 18, 21, sec. 6. Again, "the burden of establishing a completed contract is upon the assured, and he must satisfy the jury that a complete and perfect contract was made; that an agreement was entered into, and that nothing essential to the contract was left open for future determination, and the proof must be clear that such a contract was made, or an action upon it will not be upheld at law, nor will it be enforced in equity." Among the examples of fatal defects is, that "the duration of the risk is not agreed on." Wood on Fire Ins., pp. 35, 37, sec. 13; see also, May on Insurance, sec. 43; *Strohn v. Ins. Co.*, 37 Wis. 625.

II. This case presents all these defects in a marked degree, for the certificate shows upon its face, that its duration was not fixed or determined. This being true there was no valid contract of insurance. The plaintiff invokes the rules permitting such contracts to be made by parol; but among these rules are those we have quoted and which are fatal to the claim made. Wood on Fire Ins., sec. 5. These views have the full approbation of this court, which has recently subjected the general question to a careful examination. *Lingenfelter v. Ins. Co.*, 19 Mo. App. 252, 263, 264.

III. It is to be noticed that this action is brought, not on an agreement to insure, but on a complete, perfected insurance contract. In order to be binding, this contract must be complete in all its terms, the essential elements must all be agreed upon. As to such a contract it cannot be said that it will be sufficiently definite if one of the material elements is left to the mere whim of either of the contracting parties. In this case it will not do to say that the insurance company had the privilege of terminating the policy whenever it desired. Such an option was not an agreement. "Both parties must be bound, the one to insure, and the other to pay

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therefor. If the contract is not so far perfected that the insurer upon said policy could maintain an action for the premium, no perfect insurance exists, and the insurer is not liable." 1 Wood on Fire Ins., sec. 6, p. 23; *Hartshorn v. Ins. Co.*, 15 Gray, 241, 244. "Both parties must be bound or neither will be." *Lungstrass v. Ins. Co.*, 48 Mo. 201, 204. "There must be mutuality of obligation." *Brown v. Rice*, 29 Mo. 322. "A promise is a sufficient consideration for a promise where there is a mutuality of engagement, so that each can hold the other to a positive agreement." *Moss v. Green*, 41 Mo. 389. "There can be no valid contract unless the parties thereto assent to the same thing in the same sense." *Eads v. Carondelet*, 42 Mo. 113.

IV. The suggestion of Judge Comstock in 19 N. Y., "that perhaps a contract which either party could terminate at any time, by a notice to the other, might be a valid contract," was made on the basis that a complete and perfected contract existed in that case and not in such a condition, and with reference to the effect of such a clause upon the complete agreement there in question. It has no reference whatever to the point involved here. The petition does not allege that the time of the risk was to be fixed at the option of the defendant company, but the allegation merely goes to the extent of saying that the defendant's agent was to insert the day of expiration in the contract, and not how that date was to be determined. Hence, the remarks of the Supreme Court of Wisconsin in the Strohn case, with reference to filing a bill for the specific performance of this contract, are directly in point and forcibly apposite. 1 Wood on Fire Ins., 19, note; *Tyler v. Ins. Co.*, 4 Rob. (N. Y.) 151, 155, *et seq.*; *Kimball v. Ins. Co.*, 17 Fed. Rep. 625.

V. Concerning points four, five, and six made by the plaintiff we make these suggestions: (*a*) There was no allegation in the petition of a custom or usage to insure for an indefinite time, and if there was, it is not probable that such a custom or usage would have been

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permitted to override the salutary principles of the law of contracts invoked by us. *Watson v. Swann*, 103 Eng. Com. Law, 756, 770, 771. (*b*) Before the evidence here referred to could have been admitted, it was necessary to have pleaded the outside agreement, which it is said could have been shown, in the petition. A contract not sued on, nor referred to in the petition in this case, is not open for consideration on this appeal. (*c*) The same may be said of the element of estoppel, it having now been firmly established that matter constituting an estoppel *in pais* must be pleaded. (*d*) It may be true that if the defendant had accepted a premium up to a certain period and the loss had occurred prior to the expiration of that period, a recovery could have been had; but this is far different from saying that a recovery can be had where no agreement was ever made as to the essential element of the duration of the risk, but where, on the contrary, "the date was purposely left blank," and the policy "left open" on this point. So long as this essential element was not agreed upon there was no perfected contract. The judgment should be affirmed.

ELLISON, J.—This cause comes to us on a demurrer to plaintiff's petition, the material portion of which is as follows:

"That the defendant is, and was during all the dates hereinafter mentioned, a fire and marine insurance company, the same being a corporation organized under the laws of the state of Michigan, and doing business in said state, and also in the state of Missouri; that the said defendant, by its certificate of fire insurance number five hundred and thirty-six, which is herewith filed, dated August 11, 1885, did insure one W. K. Hewitt against loss or damage by fire, under and subject to the conditions of open policy number twenty-six, issued by said defendant, to one S. S. McGibbons, in the sum of two thousand dollars, on grain belonging to the said

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Hewitt, then contained in the 'Advance Elevator,' situated in West Kansas City, Missouri, from the first day of August, 1885, to a date in the future, which date was purposely left blank in said certificate of insurance, and the date of expiration was to be and remain indefinite, and was to be terminated in the future by having the date of its termination inserted in the blank left for that purpose by the said defendant or the said S. S. McGibbons, its agent; and the said certificate of insurance was made payable to the said insured, or his order, and upon the return of said certificate; and other insurance was permitted therein to the amount of two thousand dollars; that said certificate was duly issued to the said W. K. Hewitt, as the owner of said grain, for and in consideration of the usual premium charged by said defendant for that class and character of insurance, to be paid by said Hewitt or by the owner of said grain as called upon, the amount of said premium to be determined by the length of time said certificate of insurance should run. And afterwards, on the ——— day of ———, 1885, the plaintiff herein purchased the said grain in said elevator from the said Hewitt, and said certificate of insurance was duly assigned to plaintiff, etc. * * * Plaintiff further says that, in pursuance of a demand or request from the said S. S. McGibbons, agent of the defendant, he, plaintiff, paid the premium due on said certificate of insurance up to January 1, 1886, and said McGibbons gave plaintiff a receipt therefor, and the policy was still left open, and the plaintiff was to pay the premium which might accrue thereon until the same should be closed; and plaintiff has, at all times, been ready and willing, and still is ready and willing, to pay the premium due and owing on said certificate of insurance from and after said January 1, 1886."

The ground of the demurrer is, that the petition did not state facts sufficient to constitute a cause of action, in that no time was fixed by the contract when the risk was to end or the policy to expire. I will concede the

point made by defendant, that in contracts of insurance, the duration of the risk must be agreed upon. The defendant is correct in the legal propositions advanced, and the only question in the case is, in what degree are they applicable to the case as it is put, in the petition.

In point of fact, is not the duration of the risk fixed, in a legal sense? The agreement between the parties was that the insurance should terminate at a time when defendant might elect that it should end and so insert the date left blank for that purpose. At the time of making the contract, it may be supposed it was not known how long the insurance would be wanted or how long defendant would wish to continue the risk, and the parties, therefore, agreed upon the mode and manner of fixing that time. It is not a case where no reference is had or agreement come to, as to the duration of the contract. That point was considered by the parties and an agreement had with reference thereto. The minds of the parties met and fixed upon a mode of ascertaining the duration of the risk. Suppose it to have been true, as a matter of fact, that, at the time of the contract, plaintiff wanted insurance on his wheat, but did not know how long he would want it; and that defendant wanted to insure the wheat, but did not know how long it would want to continue the risk; is there any legal principle forbidding them to make it a part of their agreement that the contract should determine at a time to be named by defendant? Whether such contracts permitting one party to terminate them does not also permit the other to do the same, need not be considered here, but that such contracts are valid until determined in the manner provided, I make no question.

Though subject by its terms to be terminated by either party, a contract is not thereby invalid. *Church v. Ins. Co.*, 19 N. Y. 305.

This illustration is given by a celebrated author: "If a man shall make a lease to J. S. for so many years as J. N. shall name, it is a good one, for, when J. N. has named the number of years, the duration of the term

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becomes fixed." 1 Wash. Real Prop. 294. So a lease for so long as the lessee shall please is not void for uncertainty in duration, but is a good lease determinable, as is said by some, at the will of either party, or may be construed to be a tenancy at will. *Transfer Co. v. Lansing*, 49 N. Y. 508.

The case of *Strohn v. Ins. Co.*, 37 Wis. 625, is relied on by defendant in support of the demurrer, but I conceive the cases to be unlike. In that case the amount of premium to be paid and the continuance of the risk were not agreed upon; nor was there anything in the agreement from which these matters could be fixed and determined. *Nothing* was said as to the duration of the risk. In this case the rate was fixed and one instalment was paid to defendant as agreed upon, and the time or the duration of the risk *was* spoken of and an agreement had in reference thereto. While the duration of the risk was not determined at the time, it was not, as was said in that case, "indeterminable." The maxim, *id certum est quod certum reddi potest*, can well apply to the terms of this contract. Again, defendant has recognized the validity of this contract in a way such as to create an estoppel. It is alleded that defendant demanded of plaintiff the payment of the premium up to January, 1886, which was paid to, and accepted and receipted for by defendant, and the policy by agreement was to run as before. Such action was sufficient to work an estoppel, especially if the payment was made, as it of course was, on the faith of, and in reliance upon, the contract as stated.

As the cause is to be remanded it might be well for plaintiff's plea of estoppel to be made somewhat more specific. With the concurrence of the other judges, the judgment is reversed and the cause is remanded.

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J. M. CHRISTY, Defendant in Error, v. B. F. SCOTT, Plaintiff in Error.

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Kansas City Court of Appeals, May 23, 1888.

1. MERGER—WHEN IT TAKES PLACE AS TO ESTATES—INTENT OF PARTIES—CASE ADJUDGED.—In estates acquired by act of the parties, they merge or not and mortgages are extinguished or not, according to the intent of the parties, as collected from the deed or the circumstances of the transaction; and when these furnish no evidence of the intent, from the interest of the parties. Aside from the fact that the intention is not to be presumed to satisfy the first mortgage (in this case), because its effect would be to let in the second mortgage (when the plaintiff's money had satisfied it without any loss or prejudice to the second mortgagee), the absence of such intention affirmatively appears here from the act of the plaintiff in taking a formal assignment of the debt and mortgage: and this, by all the authorities, is conclusive on the question of intention.

2. MORTGAGE—ASSIGNEE OF DEBT SECURED BY, MAY MAINTAIN REPLEVIN—CASE ADJUDGED.—The assignee of a debt secured by mortgage can maintain replevin for the possession of the property. Nor could it affect the right of the assignee here, that he afterwards sold the property to the mortgageor, and took a new mortgage. The rule is well settled that as against a party who has acquired no intermediate right upon the faith of the satisfaction of the first mortgage, courts of equity will restore the first mortgage, even after an entry of satisfaction, for the protection of the assignee.

3. ——— SATISFACTION OF BY MISTAKE—WHAT IS SUCH MISTAKE—HOW CORRECTED.—It is competent for the first mortgagee or his assignee to show by parol that his acknowledgment of satisfaction was made through mistake. Mistake, in such connection, is nothing more than "that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." This rule has been applied to acknowledgment of payment (in cases like this) when the party was in ignorance, at the time, of the existence of a second mortgage or judgment lien.

4. PRACTICE—PROCEDURE—EQUITABLE RULES.—Equitable rules, as to procedure, are applied in writs of entry, when the property mortgaged is realty; and when such writs are employed to enforce a mortgage security instead of a bill in equity. The same rules should be applied in cases of mortgages of personalty.

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ERROR to Bates Circuit Court, HON. CHARLES W. SLOAN, Judge.

Affirmed.

Statement of case by the court.

This is an action of replevin, and grows out of the following state of facts: On the third day of March, 1883, W. A. Harris and James F. Harris executed to T. D. Rafter their chattel mortgage on the property in question to secure to said Rafter the payment of their promissory note to Rafter for the sum of $424.75. The property seems to have belonged to Wm. A. Harris. There were payments made on said note, leaving a balance due and unpaid of about one hundred and seventy-two dollars. The conditions of the mortgage being broken the mortgagee took possession of the property, and advertised the same for sale pursuant to the terms of the mortgage. On the day set for sale the plaintiff desiring to purchase such property so notified Rafter, and the parties interested coming together an arrangement was perfected by which Harris sold privately his interest in this property to plaintiff for said sum of one hundred and seventy-two dollars, which was paid over to Rafter; and thereupon Rafter assigned in due form the note and mortgage to plaintiff. Plaintiff then resold the property to Harris, and took from him a new note and mortgage on said property for the sum of two hundred dollars. This occurred on the same day, February 27, 1886. Afterward, on the same day, plaintiff acknowledged satisfaction, on the margin of the record, of said first mortgage.

It further appears that there was a second mortgage on said property executed by Harris to the Aultman & Taylor Company, bearing date July 23, 1883, to secure certain indebtedness of Harris to said company. This mortgage was also duly recorded. The defendant claims the right of possession to said property under said last-named mortgage.

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On the trial of the issues herein the plaintiff, over the objection of defendant, was permitted to testify, that at the time he made the entry of satisfaction of the first mortgage he was wholly ignorant of the existence of the said second mortgage, and that he would not have given such release receipt had he known the fact.

The cause was tried before the court without a jury. Judgment for plaintiff; from which defendant prosecutes this writ of error.

THOMAS J. SMITH, for the plaintiff in error.

I. The instructions given for plaintiff should not have been given. (1) The evidence did not show a sale of the property, but only an assignment of the security. (2) Instruction two was a mere abstraction, and the giving of that numbered three was error. *Turner v. Loler*, 34 Mo. 461; *McDermott v. Donegon*, 44 Mo. 85; *Shaffner v. Leahy*, 21 Mo. App. 110. (3) Instruction four was error, (*a*) because there was no latent ambiguity in the release calling for any explanation. 1 Greenl. Evid. [5 Ed.] sec. 275; 2 Whart. Evid. [2 Ed.] sec. 936; *Koehring v. Muemminghoff*, 61 Mo. 403; *Johnson Co v. Wood*, 84 Mo. 489. (*b*) Parol testimony was not competent to contradict or rebut this record evidence. Cases cited above. (*c*) There was no testimony introduced tending to rebut the proof of the release of the Rafter mortgage. *Brown v. Ins. Co.*, 86 Mo. 51; *Chastain v. Wright*, 19 Mo. App. 165; *Hollender v. Koetter*, 20 Mo. App. 79; *Edwards v. Meyers*, 22 Mo. App. 481. (*d*) The mortgage of Harris to the Aultman & Taylor Company having been put on record in 1883, plaintiff had notice of its contents, which, under our statutes, is more binding on him than actual knowledge. He could not, therefore, with reference to this mortgage under the law, have released the mortgage to Rafter under a mistake of fact.

II. Under the evidence, the finding and judgment in this case should have been for the defendant, the

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plaintiff in error here. (*a*) The Rafter note had been paid off and the mortgage discharged, and the release thereof made a matter of record by the plaintiff himself. 2 Jones on Mort. [3 Ed.] secs. 943, 944; *Mead v. York*, 6 N. Y. 449; *Champney v. Coope*, 34 Barb. 543; *Johnson v. Johnson*, 81 Mo. 331; *Christian v. Newberry*, 61 Mo. 447; *Bunn v. Lindsay*, 95 Mo. 250. (*b*) Plaintiff was not the owner of the property, nor did he have a right to immediate possession, and ought not, therefore, to have recovered judgment. *Sheble v. Curdt*, 56 Mo. 437; *Fleming v. Clark*, 22 Mo. App. 218. (*c*) If plaintiff had any right against the property in dispute superior to the right of the Aultman & Taylor Company, it was only equitable, and would not support this action. *Pilkington v. Trigg*, 28 Mo. 95. (*d*) Under the mortgage from Harris to Christy, plaintiff was not entitled to possession at time of suit, because there had been no breach of the conditions of this mortgage. *Bennett v. Timberlock*, 57 Mo. 449; *Sheble v. Curdt, supra.* This mortgage was also subsequent to the one under which defendant held the property.

III. The taking of the new note and mortgage and the acknowledgment of payment of the old, show that payment of the old note was what was intended, and what was done. 3 Rand. Com. Paper, p. 595, secs. 1512, 1513.

FRANCISCO & ROSE, for the defendant in error.

I. Christy took an assignment of the Rafter mortgage and note, in due form and in writing, and his title was legal, not equitable.

II. There had been a breach in the mortgage from Harris to Rafter, giving Christy a right to take possession of the property.

III. The release on the margin of the record of the Rafter mortgage was a mere receipt, which might be explained and rebutted by parol testimony in an action at law, and plaintiff was not bound to resort to a suit in equity to have it cancelled. *Joerdens v. Schrimpf*,

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77 Mo. 387; *Chappell v. Allen*, 38 Mo. 213; Boone on Mort., sec. 155, p. 209; *Bruce v. Nelson*, 35 Iowa, 157; *Stimpson v. Pease*, 53 Iowa, 572; *Lambert v. Leland*, 2 Sweeny, 218; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Shaver v. Williams*, 87 Ill. 469.

IV. The Aultman & Taylor Company were not injured by Christy's negligence, even granting that there was negligence, and cannot ask to profit by it.

V. There had been a breach in the mortgage from Harris to Christy.

PHILIPS, P. J.—There seems to have been no question made at the trial as to the integrity and fairness of the transactions between Harris, Rafter, and plaintiff. The evidence showed that one hundred and seventy-two dollars was the reasonable value of the property at the time. By that purchase plaintiff acquired all the right, title, and interest of Harris in the property. That was the equity of redemption of Harris as against Rafter, the mortgagee. And by the payment to Rafter of the amount of his debt, and taking an assignment thereof, with the mortgage, plaintiff acquired and became entitled to all the rights which Rafter had at the time of such assignment.

At law, and as to these parties, the complete title to this property became vested in plaintiff, and there would be a merger of the equitable in the legal title, both uniting in the same person. But it may be conceded, for the purpose of this controversy, that there having been no formal foreclosure of the first mortgage, conformably to its provisions, and the second mortgagee, the Aultman & Taylor Company, not having been parties consenting to the private sale and transaction between Harris, Rafter, and plaintiff, the right of said company to redeem against the first mortgage was not affected.

It would further follow that if the legal effect of the transaction between Harris, Rafter, and plaintiff, and the acts done by plaintiff, were to release said property

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from the operation of the first mortgage, the Aultman & Taylor Company mortgage would have priority over the last mortgage taken by plaintiff from Harris.

A brief reference to established rules will reduce this question to a simple solution. In Greenleaf's note to 1 Cruise, 239, it is said: "In estates acquired by act of the parties, they merge or not, and mortgages are extinguished or not, according to the intent of the parties, as collected from the deed or the circumstances of the transaction; and when these furnish no evidence of the intent, from the interest of the parties." "Merger is not favored in equity, and is never allowed, unless for special reasons, and to promote the intention of the party. The intention is considered in merger at law, but is not the governing principle of the rule, as in equity." 4 Kent Com. 102. "A person becoming entitled to an estate subject to a charge, for his own benefit, may, if he choose, at once take the estate and keep up the charge." *Forbes v. Moffat*, 18 Ves. 390.

So it is said, in *Thompson v. Chandler*, 7 Greenl. 377: "If the purchaser of a right in equity to redeem a mortgage takes an assignment of it, this shall not operate as an extinguishment of the mortgage, if it is for the interest of the assignee to uphold it." See also, *Gibson v. Crehore*, 3 Pick. 475; *Robinson v. Levitt*, 7 N. H. 100.

Aside from the fact that the intention is not to be presumed to satisfy the first mortgage because its effect would be to let in the second mortgage, when plaintiff's money had satisfied it without any loss or prejudice to the second mortgagee, the absence of such intention affirmatively appears in this case from the act of the plaintiff in taking a formal assignment of the debt and mortgage. This, by all the authorities, is conclusive on the question of intention.

As the assignee of the debt and mortgage plaintiff could maintain replevin for the possession of the property. *Kingsland & Ferguson Mfg. Co. v. Chrisman*, 28 Mo. App. 308. Nor could it affect the right that he

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afterward resold the property to Harris and took a new mortgage.

The rule is well settled that, as against a party who has acquired no intermediate right upon the faith of the satisfaction of the first mortgage, courts of equity will restore the first mortgage, even after an entry of satisfaction, for the protection of the assignee. *Bruce v. Nelson*, 35 Ia. 157; *Young v. Morgan*, 89 Ill. 202; *Stinson v. Pease*, 53 Ia. 574; *Morgan v. Hamet*, 23 Wis. 30; *Barnes v. Mott*, 64 N. Y. 397.

But, appellant says, the plaintiff afterward entered satisfaction of the first mortgage, and that destroyed the effect of the formal assignment of the debt and mortgage, as it evidenced an abandonment of the first lien. It nevertheless remained a question of intention, which is a question of fact; and any reasonable doubt as to this issue is always resolved in favor of the first lien holder, where the rights of no third party have intervened, after the entry of such satisfaction. *Bean v. Boothly*, 57 Me. 302, 303. The acknowledgment of satisfaction of the first mortgage possessed no more sanctity, nor conclusive force than a receipt for the money, which is always, both at law and equity, open to explanation. *Crosby v. Chase*, 17 Me. 371; *Homer v. Grasholz*, 38 Md. 525. So it is competent for the first mortgagee or his assignee to show by parol that such acknowledgment of satisfaction was made through mistake. Mistake in such connection is nothing more than "that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." Story Eq., sec. 110, note 1. This rule has been applied to acknowledgment of payment in cases of this character, when the party was in ignorance, at the time, of the existence of a second mortgage or judgment lien. *Bruce v. Nelson, supra; Stimson v. Pease, supra; Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Young v. Morgan*, 89 Ill. 205. As said in *Shaver v. Williams*, 87 Ill. 472:

"Appellant has in no manner been misled or deceived, and under such circumstances to give him priority of lien, from the fact alone that appellee canceled of record one mortgage, no portion of his debt having been paid, and at the same time accepted another mortgage, deriving no substantial advantage which he did not previously have, would be neither just nor equitable."

Nor is there any valid force in the suggestion of appellant that when plaintiff made the entry of satisfaction he had constructive notice of the recorded mortgage of the Aultman & Taylor Company. DAY, J., in *Bruce v. Nelson*, *supra*, most appositely observed of this position, that it proves too much: "In order that a debt may attach as a lien prior to a mortgage, it must always, in some way, appear of record, so that in every case in which the claim is in a condition to be asserted in preference to the mortgage, the mortgagee has the means of ascertaining its existence. The argument, then, would amount to this, that a mortgage released in mistake could never be restored against a prior claim, which was in a condition to become a lien. In other words, that the lien of the mortgage could never be restored, except when the restoration was unnecessary and unimportant."

The case of *Bunn v. Lindsay*, 95 Mo. 250, is unlike this. Bunn in lending the money to the mortgageor did so for the purpose of having the first mortgage lien satisfied, and before he took the second mortgage required, as is the custom with such money-lenders, the satisfaction of the first mortgage. He never bought the equity of redemption of the mortgageor, nor did he take any assignment of the debt or mortgage, nor did he have any agreement therefor. So at the time he had the entry of satisfaction made of the first mortgage he had really no right or interest in the property to be protected by keeping alive the first mortgage. The decision is in accordance with the well-settled law in such instances, because he paid off the first mortgage "without any agreement that the security should be assigned."

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The only remaining question for determination is, whether the plaintiff can avail himself of this mistake in this form of action. We make no question of the general rule, that in the action of replevin the better legal title or right will prevail; and that the correction of mistakes belongs ordinarily to the "most ancient jurisdiction" of the courts of equity. But in the application of rules of law in practice, we should never lose sight of the reason of things. The action of replevin, in many respects, bears a strong resemblance to that of ejectment. It involves the right of property and the possession. The form of pleading is much the same. Neither party can know from the form of the pleadings on what claim of title, or line of proof, the case will depend and proceed. In the action of ejectment, where either party offers in evidence a deed in the chain of evidence, the adversary may attack it for fraud, although a court of equity would have jurisdiction to set it aside. So in the action of replevin, the defendant, under the general issue, may assail the plaintiff's title, under deed or bill of sale, for fraud, and show the facts which in equity would pronounce it void. *Greenway v. James*, 34 Mo. 328; *Young v. Glascock*, 79 Mo. 574.

In the case at bar when the plaintiff put in evidence the mortgage and debt and the assignment thereof to him, he had made out a *prima-facie* case. To overcome this the defendant put in evidence the entry of satisfaction made by plaintiff. As already stated, that release possessed no higher character than a receipt, which, at law as in equity, may be explained by parol. By his parol evidence the plaintiff merely met the evidence offered by the plaintiff, by showing that the receipt was given through mistake of fact, and was, therefore, not conclusive. This, it seems to me, was as admissible in this action as if the defendant had put in evidence a paper purporting to be the acknowledgment of payment of the mortgage note, and the plaintiff had then offered evidence to show that the supposed receipt was a forgery,

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or fraudulently and forcibly obtained, and was without consideration.

It is held, in *Bell v. Woodward*, 34 N. H. 96; *Towle v. Hoit*, 14 N. H. 67; and *Hatch v. Kimball*, 16 Mo. 149, that the equitable rules, above discussed, are applied in writs of entry, where the property mortgaged is realty, and where such writs are employed to enforce a mortgage security, instead of a bill of equity. It does seem to me that it would be sticking to form rather than substance to send this plaintiff out of the law court to its equity side on such technicality as to procedure.

The case having been tried by the court, without a jury, and the verdict on the law and evidence being for the right party, it is unnecessary to consider the declarations of law.

The other judges concurring, the judgment of the circuit court is affirmed.

31a 340 / 31a 487 JOHN MCCAFFERY, Respondent, v. MEMPHIS AND CHARLESTON RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, May 23, 1888.

1 PRACTICE — FILING OF TRANSCRIPT OF RECORD IN APPELLATE COURT—DUTY AS TO ORDERING TRANSCRIPT.—The law is well settled that it is the duty of the party appealing to see that the transcript of the record is made out, and filed in this court, and he has no right to rely on the circuit clerk to perform this duty of his own motion.

2 ——— FAILURE OF GIVING DIRECTIONS FOR TRANSCRIPT TO CIRCUIT CLERK.—Where a party, as in this case, waits until the last day, before giving directions to the circuit clerk to make out and forward the transcript of the record, he does so at his peril; and if, for lack of time or pressure of other work in his office, the clerk is unable to complete the transcript in time, the appellant must bear the loss. (*Kamerick v. Castleman*, 21 Mo. App. 587, *distinguished*.)

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Appeal from Jackson Circuit Court, Hon. James H. Slover, Judge.

On motion for rehearing upon dismissal of appeal.

H. S. Julian, for the motion.

I. It seems to us that in passing upon this motion two questions should be considered: (1) Has appellant or its counsel been negligent, or have they tried to cause delay? (2) Has respondent been injured?

II. We challenge respondent to point to an act or word in the whole course of these proceedings that can be translated into neglect or an attempt to delay. This court made an order that all cases filed after January 20, 1888, should go over to the October term. Now appellant had a right to file the transcript on February 19, and the order carries it to the October term; as it was filed February 27, it still goes on the October docket, so that respondent gets a hearing just as soon one way as the other, and no sooner, and consequently can't claim he is injured from that direction.

III. This subject is discussed in a similar case, by this court, in *Kamerick v. Castleman*, 21 Mo. App. 593, 594, and under exactly this phase of the case the court ask, "what right, then, has respondent lost?" and answer, "none whatever. There can no prejudice possibly arise." And refuse to cut appellant off from a hearing on the merits of his cause—with what the court so well defines as "a dry, cold technicality." This is even a stronger case than that; there the clerk was negligent in not knowing the terms of this court; here the clerk makes affidavit "that, on account of the great mass of business, he was unable to get the transcript out any sooner than he did." If attorney for respondent wishes to lay the fault somewhere—let him charge it up to his Texas trip and not to our clients; for if he had been in his office when the transcript was first carried

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there it would have been sent up in time for this term, for we are as anxious for an early trial as respondent. We have nothing to gain by delay, we have given a good bond to pay the judgment with interest, if it is affirmed, and it isn't likely that the law governing the case will be changed between now and next October. *Boggs v. Ins. Co.*, 31 Mo. 499; *Caldwell v. Hawkins*, 46 Mo. 263; *Kamerick v. Castleman*, 21 Mo. App. 494.

Per Curiam.—On the eighteenth day of April, 1887, plaintiff recovered judgment against defendant in the Jackson circuit court for $783.50. On the twenty-ninth day of October, 1887, the defendant perfected its appeal therefrom to this court. It having failed to file in this court the transcript of record within fifteen days next before the present term of court, which began on the fifth day of March, 1888, on motion of respondent the judgment of the lower court was affirmed. Appellant has filed motion for a rehearing, and insists that the court shall state the reasons for such affirmance. We do so for the purpose of removing from the mind of counsel what we observe to be a common error in the minds of many attorneys respecting the practice in such matters. The excuse given by appellant's counsel for the delay in bringing into this court the transcript is, that owing to the act of the opposing counsel in retaining the bill of exceptions for examination, and the inability of the clerk to perfect the transcript, the delay was no fault of his. The facts are that the bill of exceptions was returned by respondent's counsel to appellant, and filed in the clerk's office on the sixth day of January, 1888; and yet no transcript was filed here until the twenty-seventh day of February, 1888, only seven days before the first day of the March term. It also appears from the affidavits herein that the appellant did not leave any order with the clerk of the circuit court to make out the transcript until the eighteenth day of February, 1888. That was on Saturday, and the

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last day on which it was possible for the clerk to make out the transcript in time for the said March term. Here then was a delay of over three weeks, after the bill of exceptions was perfected, before any order was given by appellant to have the transcript made out. For this delay no legal excuse is given. The law is well settled that it is the duty of the party appealing to see that the transcript is made out and filed in this court; and he has no right to rely on the circuit clerk to perform this duty of his own motion. For aught the clerk knows, the party appealing may elect to abandon his appeal, or the parties may have compromised or settled the judgment. And if he should of his own motion make out such transcript, he might not be able to obtain pay therefor. Where a party, as in this case, waits until the last day before giving direction to the clerk to make out and forward the transcript, he does so at his peril; and if, for lack of time, or the pressure of other work in his office, the clerk is unable to complete the transcript in time, the appellant must bear the loss.

The facts and circumstances of this case are unlike those in *Kamerick v. Castleman*, 21 Mo. App. 587. There, when this court made its order in January directing what cases should be placed by the clerk on the March docket, the opposite counsel had in his possession the bill of exceptions for examination and concurrence, so that the transcript, on account of the action of the adverse party, could not have been here at the time of the assignment of cases for that term. In this case there was ample time between the filing of the bill of exceptions with the clerk and the order of this court, of date January 20, to have had the transcript here for that assignment. We will here take occasion to say that the language of the court in the Kamerick case, respecting the respondent losing nothing by the delay in not filing the transcript before the special order of this court assigning causes for the coming term, must be understood in reference to the peculiar facts and circumstances of that

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case, and the condition of the docket at that time; and is not to be so extended as to nullify the statute which requires all cases appealed, fifteen days before the return term, to be filed in the clerk's office, and entitling the respondent to an affirmance for such failure, without reasonable cause being shown for such neglect. In the state of the docket at the time the Kamerick case was here there was scarcely a possibility that the court could more than dispose of the number of cases assigned by the January order for hearing at the next term. The preliminary order preceding the commencement of court is to enable parties, whose causes may be reached, to comply with the statute and the rule of the court in the matter of preparing briefs and abstracts.

But it is perfectly competent for the court, at a later day, to make a further assignment of causes for hearing at that term; and parties taking appeals must keep in mind the statutory mandate respecting filing transcripts, so as to advise the opposite party that the cause may stand for hearing at that term, should the state of the court's work admit of it. The language of the court in the Kamerick case was merely to indicate that under the peculiar circumstances surrounding it the respondent lost nothing by the delay; whereas, in the case under review, had the appellant filed its transcript, as it should and could have done, the cause would have stood for hearing at this term on its merits. By its own unnecessary default and neglect it ought not to delay the hearing and disposition of the appeal, nor ask us to set aside the statute in its favor.

The motion for rehearing is denied.

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THE ST. LOUIS, KANSAS CITY & COLORADO RAILWAY COMPANY, Appellant, v. F. A. NORTH, Respondent.

St. Louis Court of Appeals, May 29, 1888.

1. PRACTICE—CONDEMNATION PROCEEDINGS—OPENING AND CLOSING. In a trial before a jury, in a proceeding under the statute for the condemnation of land for railroad purposes, there is no error in permitting the defendant land-owner to assume the burden of proof and to open and close the case.

2. DAMAGES, REMOTE.—In considering the question of damages to an owner for the occupancy of his land by a railroad track, an estimate of increased danger from fire is too remote, and not proper to be submitted to the jury.

3. DAMAGES—REMOVAL OF FARM CROSSING.—It is not a legitimate element of damages in a condemnation proceeding, that the railroad company may at some time remove or abolish a farm-crossing already established; and an instruction permitting the consideration of such an element is error.

4. EVIDENCE—PROOF OF CORPORATE EXISTENCE.—The defendant is not required to prove the corporate existence of the plaintiff, when the plaintiff has not put that fact in issue by affidavit, in accordance with the act of 1883.

APPEAL from the Franklin Circuit Court, HON. RUDOLPH HIRZEL, Judge.

Reversed and remanded.

JOHN C. ORRICK, for the appellant: The burden was on the plaintiff, the St. Louis, Kansas City & Colorado Railroad Company, and it had the right to open and close the case. The ruling of the court below in this regard was error. Const. of Mo., art. 2, sec. 21; Rev. Stat., sec. 896; *Railroad v. Ridge*, 57 Mo. 599; *Almeroth v. Railroad*, 13 Mo. App. 91; *McReynolds v. Railroad*, 106 Ill. 157; *Neff v. Cincinnati*, 32 Ohio St. 215; *Ins. Co. v. Penna*, 16 Ohio, 324; *Geach v. Ingall*, 14 M. & W. 95; *Ashby v. Bates*, 15 M. & W. 589; *Huntington v. Carkey*, 33 Barb. 218; *Young v. Highland*, 9 Gratt. 16; *City v. Frank*, 9 Mo. App. 579;

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Wharton on Evidence, sec. 357; 1 Archibold's Prac., 385. The court erred in its instruction numbered two, given at the instance of the defendant, wherein it told the jury that it might consider the ordinary danger of injury by fire created by the construction and operation of plaintiff's road so far as they might believe such damage lessened the value of the land. Such damages, if any, are too remote and should not have been submitted to the jury. *Proprietors v. Railroad*, 10 Cush. 385; *Turnpike Co. v. Railroad*, 11 N. J. Law, 314; *Rodemacher v. Railroad*, 41 Iowa, 297; *Railroad v. Lazarus*, 28 Penn. 203. The court erred in giving the instruction numbered three for the defendant, wherein it instructed the jury that in estimating the defendant's damages they should consider defendant's right to go upon said strip of land comprising plaintiff's right of way at any other place than such farm-crossings as completely cut off by the condemnation of said strip. It appears from the evidence that a farm-crossing had been established for defendant, under a high trestle, which was satisfactory to defendant, but it was claimed that, inasmuch as plaintiff could change the crossing and close it up, the contingency of the exercise of this power was an element of damages to be considered by the jury. In the first place we insist that the instruction is not the law. The plaintiff has no power to establish farm-crossings and then remove or close them and establish them at improper or inconvenient places. Mills on Em. Dom. [2 Ed.] sec. 213. Again, if such power existed, the possible exercise of it at some future time from which damage might accrue to the defendant is too remote to constitute in this case an element of damage. The court erred in overruling plaintiff's objection to the following question propounded to witnesses: "Did you take into consideration the fact that railroads, when constructed and put into operation in the ordinary course for the transportation of cars by steam, make an increased danger of fire?" This evidence was incompetent and

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immaterial. An increased danger of fire is not an element of damage proper for the consideration of the jury.

CREWS & BOOTH and MARTIN, for the respondent.

PEERS, J., delivered the opinion of the court.

This is an action under the statute seeking to condemn certain lands in Franklin county, the property of defendant, for the use of plaintiff as its right of way. The petition was filed on May 24, 1886, in the Franklin county circuit court, and is in the usual form, concluding with the prayer for the appointment of three disinterested freeholders, residents of Franklin county, to ascertain and assess the damages. On June 5, 1886, the court by proper entry of record made an order appointing the commissioners, as asked by the petition. Their report was filed on the fourteenth of the same month, by which they allowed defendant $275.22 as his damages.

On the twenty-eighth day of June, 1886, defendant filed his exceptions to said report, which were sustained, and the report of the commissioners set aside, whereupon the court ordered the question of compensation to be tried by a jury.

The defendant assumed the burden by leave of court and went forward with the introduction of evidence as to his damages, and proceeded to open and close the case to the jury. To this the plaintiff objected and assigned the same as error.

The defendant introduced evidence showing the location of the line through his land, the distance and width of said line, and the further fact that the plaintiff had actually entered upon and occupied the land, and constructed and put in operation its road over and across the same. The defendant also introduced a number of witnesses to show that he had sustained damages in the sum of eight hundred dollars; and also offered

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evidence tending to show that, by the erection and maintenance of said railroad, that part of his land not taken for right of way was subject to increased danger of injury and damage by fire.

To the admission of this evidence plaintiff objected, and assigns the same as error.

The plaintiff introduced the evidence of three witnesses whose testimony tended to show that the damage to defendant was from two hundred and sixty-five to three hundred dollars. On cross-examination these witnesses were asked: "Did you take into consideration the fact that railroads, when constructed and put in operation in the ordinary course for the transportation of cars by steam, make an increased danger of fire?" This was objected to by the plaintiff, and the objection overruled by the court, which ruling is also assigned as error.

Quite a number of instructions were given for the defendant, but we need not incorporate them in this opinion. The first, second, and third were objected to.

On behalf of plaintiff, the following instructions were refused:

"The court instructs the jury that, in estimating the damages done to the land of the defendant, they cannot take into consideration the fact that stock might be killed at some time in the future by reason of the road, or that fire might occur, or any other speculative damages."

"The court declares, as matter of law, it was the duty of defendant North, having, at his own request, and over the objections of plaintiff, taken the burden of proof upon himself by going forward in the trial of the cause to prove every fact showing jurisdiction and the corporate existence of plaintiff, and having failed to show such facts, the plaintiff cannot recover."

"The jury are further instructed that they are not to consider or estimate any damage to North's property by reason of the possible or probable injury to, or destruction of, any property, stock, grain-houses, barns,

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crops, or grasses by means of fire escaping from, or communicating directly or indirectly by, any locomotive engine in use upon said road, and all evidence of any probable damage that may hereafter result from fire escaping from plaintiff's locomotive engines is not to be considered by the jury in estimating the damages to which the defendant may be entitled."

"The court withdraws from the consideration of the jury any and all evidence of any damage that may hereafter result to the defendant's land by reason of any fire escaping from any of the company's locomotive engines."

The jury returned a verdict for defendant North, fixing his damages at $502.32, upon which judgment was rendered.

After unsuccessful motions in arrest of judgment and for new trial plaintiff brings the case here by appeal.

We will take up and dispose of the questions in this case as they appear.

I.

Did the court err in permitting the defendant to assume the burden of proof and to open and close the case?

It is well settled in this state that the order in which evidence may be introduced is discretionary in the trial court and unless there is a flagrant abuse of that discretion that is no ground for a reversal of the judgment. *Davis v. Railroad*, 13 Mo. App. 449; *Morey v. Staley*, 54 Mo. 419; *Russell v. Berkstresser*, 77 Mo. 417; *Powell v. Railroad*, 35 Mo. 457; *State v. Daubert*, 42 Mo. 239. There was no abuse of this discretion in this case. The question as to which party ought to have been allowed to open and conclude before the jury becomes unimportant, but it may be observed that the party on whom the burden of proof lies in the first instance ought to be allowed to open and close before the jury. *Porter v. Jones*, 52 Mo. 399. As the defendant

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assumed the "laboring oar" by direction of the court, we see no error in permitting him to open and close the case. The burden of proof is upon the party who substantially holds the affirmative of the issue to be tried, and carries with it the right to open and close. On determining who holds the affirmative of the issue, regard is had to the substance and effect of the issue, not to its form. 1 Greenl. Evid., sec. 74; *Mercer v. Wall*, 5 Q. B. 447; *Elder v. Oliver*, 30 Mo. App. 575.

II.

The trial court permitted the defendant, in the cross-examination of one of plaintiff's witnesses, to ask the question whether he took into consideration the increased danger of fire to the defendant's premises in fixing the amount of damages. This we think was improper, as such damages, if any, are too remote and should not be submitted to the jury. *St. L., K. C. & Col. Railroad v. North, post*, p. 351.

III.

The court erred in giving the third instruction asked by defendant. It appears from the evidence that a farm-crossing had been established for defendant *under a high trestle*, and it was claimed that inasmuch as plaintiff could change the crossing and close it up, the contingency of the exercise of this power was an element of damages to be considered by the jury. We do not think this is the law. The plaintiff has no power to establish farm-crossings and remove or close them at pleasure and establish others at improper or inconvenient places. Mills Eminent Domain, sec. 213. The statute of this state (Rev. Stat. sec., 809), as amended by the act of 1885 (Acts 1885, p. 88), requires railroad companies whose road runs through the lands of another to erect and maintain all necessary farm-crossings of their roads for

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the use of the proprietors or owners of the lands adjoining such roads, and if the company does not do so, then the land-owner may, at the expense of the company, recover not only the expense of making such crossings, but ten per cent. interest thereon, costs and attorney's fees. This being true, the railroad company could not close up this crossing, and if it did so, it would be an actionable injury to be redressed when it occurred, and hence not the subject of an award of damages in this proceeding.

IV.

It is not necessary to add that the trial court committed no error in not requiring the defendant to show the "corporate existence" of the plaintiff, as no such fact was put in issue by the pleadings. If the plaintiff desires to raise this question it must be done by affidavit filed with the pleadings under the act of 1883.

On account of the errors above referred to, the judgment in this case will be reversed and the cause remanded. All concur.

ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY, Appellant, v. MARTHA F. NORTH, Respondent. 31a 351 / 31a 350

St. Louis Court of Appeals, May 29, 1888.

1. **MISCONDUCT—TALKING TO JURY—PRACTICE, APPELLATE.**—Remarks improperly made to a jury about the merits of a case pending before them will furnish no ground for a reversal, when the irregularity was not properly objected to at the time of its occurrence.

2. **CONDEMNATION PROCEEDINGS—OPENING AND CLOSING.**—In a condemnation proceeding to subject land to railroad purposes, there is no error in permitting the defendant land-owner to open and close the case.

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3. **DAMAGES—DANGER FROM FIRE.—A supposed increase of danger from fire is not a proper element of damages to be considered in the owner's favor, in a proceeding under the statute to condemn land for railroad purposes.**

APPEAL from the Franklin Circuit Court, HON. RUDOLPH HIRZEL, Judge.

Reversed and remanded.

JOHN C. ORRICK, for the appellant: The burden was on the plaintiff, the St. Louis, Kansas City & Colorado Railroad Company, and it had the right to open and close the case; the ruling of the court below in this regard was error. Const. of Mo., art. 2, sec. 21; Rev. Stat., sec. 896; *Railroad v. Ridge*, 57 Mo. 599; *Almeroth v. Railroad*, 13 Mo. App. 91; *McReynolds v. Railroad*, 106 Ill. 157; Whart. on Evid., sec. 357; *Neff v. Cincinnati*, 32 Ohio St. 215; *Ins. Co. v. Penna*, 16 Ohio, 324; *Geach v. Ingall*, 14 M. & W. 385; *Ashby v. Bates*, 15 M. & W. 589; *Huntington v. Carkey*, 33 Barb. 218; *Young v. Highland*, 9 Gratt. 16; *City v. Frank*, 9 Mo. App. 579; 1 Arch. Prac. 385. The court erred in its instruction number three, given at the instance of defendant, wherein it told the jury that it might consider the ordinary danger of injuries by fire created by the construction and operation of plaintiff's road so far as they might believe such danger lessened the value of the land. Such damages, if any, are too remote, and should not have been considered by the jury. *Parrot v. Railroad*, 10 Ohio St. 624; *Proprietors v. Railroad*, 10 Cush. 385; *Turnpike Co. v. Railroad*, 11 N. J. Law, 314; *Rodemacher v. Railraad*, 41 Iowa, 297; *Railroad v. Lazarus*, 28 Penn. 203. The judgment in this case should be reversed because F. A. North, representative of the defendant, who was present with the jury when they viewed the premises sought to be condemned, violated the order of the court, and attempted, by his conversation with the jury, to influence their verdict.

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CREWS & BOOTH and MARTIN, for the respondent.

PEERS, J., delivered the opinion of the court.

This is an action under the statute to condemn certain lands of the defendant for the use of the plaintiff in constructing its railroad track through Franklin county, Missouri.

On the presentation of the petition the court appointed commissioners who, after viewing the land, assessed the damages at $257.66. To this report and assessment the defendant filed her exceptions, which the court sustained, and the matter was thereupon submitted to a jury.

This case is very similar to the one against F. A. North by the same plaintiff (*ante*, p. 345), the issues and questions in each being the same with this exception: On the trial of this cause, the court, by consent of both parties, instructed the jury to "view the land," and placed them under the care of a deputy sheriff for that purpose, instructing them as follows:

"The sheriff will take you to-morrow morning to view the lands of Martha F. North, through which the St. Louis, Kansas City and Colorado Railroad Company has obtained a right of way and built the railroad. You will examine the lands of said Martha F. North and also the right of way, embankment, and tracks of the Colorado Railroad, with the view to ascertain the value of the land taken by the railroad as a right of way and the damage done to the whole tract of land by reason of said right of way and the construction of said railroad. You will also examine the location and lay of the land and the quality and value of all of said land so far as you can ascertain the same by simply viewing it. You will be shown the lands of defendant, Martha F. North, and its boundary lines, and also plaintiff's right of way, by a witness of plaintiff and one witness of defendant. You will not allow these witnesses nor any one else to speak to you about the damages, nor will you allow any

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one to influence your minds. You are not to decide this case from what you see on or about the land and right of way, but you are sent there to enable you to better understand the evidence introduced after your return. You must leave your minds free and unbiased and you must not speak about the merits of the case even among yourselves. After viewing the lands and right of way as above referred to, you will at once return to court with the sheriff and you will then try the cause upon the evidence which will be introduced and the law to be declared by the court, when your view and appraisement of the land will assist you in weighing the evidence and to arrive at a correct conclusion."

Pursuant to this order the sheriff, together with one Eckert representing the plaintiff, and F. A. North acting for the defendant, repaired to the land, and while viewing the same Mr. North called the attention of the jury to the lay of the land, and especially to a certain farm-crossing, using the words: "Now you can see for yourselves that this is the only place that a crossing could be made." The jury returned into court and after hearing the evidence returned a verdict for defendant assessing her damages at $473.83.

The plaintiff filed its motion in arrest and for a new trial alleging various grounds therefor, among others, the following:

"Because the jury disobeyed the order of the court while upon the land and allowed one F. A. North to talk to them about the merits of the case."

The motions being overruled the plaintiff appealed.

We are not prepared to say that the remarks of Mr. North were intended by him to influence the minds of the jurors; in fact, he seems to have made them with the approval and in the presence of Eckert, the representative of the plaintiff, who consented thereto. But it was, nevertheless, improper and in violation of the instructions of the court. While this is true, it does not afford ground for reversal, because the plaintiff's counsel were apprised of it when the jury returned

from viewing the land. They did not then bring the matter to the attention of the court and offer their objections and exceptions, as it was their duty to do. A party cannot stand by and see an irregularity take place, omit to call the attention of the court to it, take his chances of a favorable verdict, and then if the verdict is against him make it a ground for a new trial. No proposition in judicial procedure is better settled than this.

Nor will this judgment be interfered with on the second ground assigned, *i. e.*, the objection that the plaintiff was not permitted to begin and reply, since that is a matter of discretion with the court, and no abuse of the discretion appears. *Elder v. Oliver*, 30 Mo. App. 575, and *St. L., K. C. & Col. Railroad v. North*, *ante*, p. 345.

The other question growing out of giving the instruction as to damages by fire is fatal to this judgment and necessarily demands a reversal of the case. Damages by fire are sometimes the result of negligence and quite frequently the result of unavoidable accident which necessarily attends the operation of a steam railway. Those which are the result of negligence cannot be taken into consideration in estimating damages in condemnation proceedings for the very good reason that negligence is a wrong, and it is not to be presumed that such an injury will take place. On the other hand the authorities seem to hold that those which are the outgrowth of unavoidable accident (or the usual danger without negligence) which attends the operation of steam railways may be taken into consideration in estimating such damages. *Railroad v. Yeiser*, 8 Pa. St. 366; *Railroad v. Barlow*, 3 Ore. 311. But since the recent statute (Acts 1877, p. 101) there can be no question but that railroad companies are responsible for injuries by fire communicated from their locomotives, irrespective of the matter of negligence; and landowners may have an action under the statute for such

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damages in every case regardless of the matter of negligence. Therefore, the instruction, as well as the evidence bearing on this question, was improperly given and admitted, as such prospective damages cannot be properly assessed in proceedings of this nature. 27 Pa. St. 99; 29 Pa. St. 203; 2 Mees. & W. 824; 10 Cush. 385; 41 Iowa, 297.

It is very desirable that matters of this character should be settled upon view, but it is equally important that the rights of all parties should be properly guarded.

On account of the error last mentioned, the judgment will be reversed and the cause remanded. The other judges concur.

JOHN FITZGERALD, Respondent, v. HARRIET BEERS *et al.*, Appellants.

St. Louis Court of Appeals, June 5, 1888.

1. EVIDENCE—DRAWINGS AND PLANS.—It is not required that a witness who testifies to his measurements of plastering work, shall produce the tracings or drawings by which he made his measurements.
2. MECHANIC'S LIEN—EXTRA WORK.—Where a subcontractor's contract requires that all extra work shall be first agreed upon in writing by the superintendent and the principal contractor, the subcontractor will be entitled to compensation nevertheless for extra work made necessary by a change of plans and dimensions without his knowledge until after the work was done, and when the principal contractor has absconded and the superintendent refuses to give any writing.
3. BUILDING CONTRACT—OPINION OF WITNESS.—A contract provision requiring that the superintendent's opinion, certificate, report, and decision on all matters shall be binding and conclusive on the principal contractors, does not bind the plaintiff subcontractor to an estimate or opinion given by the superintendent as a witness in the trial of the cause.

APPEAL from the St. Louis Circuit Court, HON. LEROY B. VALLIANT, Judge.

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Affirmed.

KRUM & JONAS and TAYLOR & POLLARD, for the appellants: The dimensions to be plastered, under plaintiff's contract, could only be proved legally by the introduction of the drawings, plans, and elevations. And inasmuch as his alleged extras, in any event, could only be the excess, in kind, over the contract work, it was impossible to prove legally the extras without proving legally and definitely the amount of contract work. Before secondary evidence can be heard it must appear that primary cannot be obtained. *Davis v. Hilton*, 17 Mo. App. 322; *Blondean v. Sheridan*, 81 Mo. 556; *Price v. Hunt*, 59 Mo. 258; *Washington Co. v. Railroad*, 58 Mo. 378; *State v. County Ct.*, 59 Mo. 513. Where parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and in such cases oral testimony, to show what the contract embraced, is rejected. 1 Greenl. on Evid. 275. The contract sued on is explicit that there shall be no charge for extras, unless there is an agreement entered into fixing the amount to be paid therefor before the work is done. Here no such agreement was ever made. The mere fact that J. Strimple & Son left the state, and that Hellmers, the architect, refused to certify as to the value of the alleged extras, after the work was done, is not a sufficient excuse for the court to disregard the obligation of the contract. The plaintiff's contract, among others, contains this provision: "The superintendent's opinion, certificate, report, and decision on all matters to be binding and conclusive on the parties to this contract." Hellmers, the superintendent, was called as a witness by plaintiff, testified and gave it as his opinion, that there were only seventy-five and two-thirds yards

of extra plastering, and no more, which, at thirty-five cents per yard, amounts to $26.48, and no more. Now, we insist, if plaintiff was entitled to recover at all for extras, he was bound by the opinion of the superintendent, and, therefore, this instruction should have been given.

JAMES L. BLAIR, for the respondent: The appellants' chief ground of error assigned is, that the court admitted secondary evidence of the contents of written documents, when the absence of the same was not accounted for, the documents being the plans and specifications of said building. An examination of the record will show that the contents of those documents were not in any sense gone into; nor did the plaintiff make any such attempt. The plaintiff was asked upon what data he made his bid; he replied he had tracings of the plans to take the height and dimensions of the buildings from. He merely identified certain documents as being in existence, without going into or being asked to go into their contents. Such evidence was entirely competent to go before the jury. *Gas Co. v. City*, 12 Mo. App. 572. The plaintiff is relieved from the obligation of the contract requiring all extra work to be agreed upon in writing before the same was done, and the agreement to be signed by Strimple & Son and the superintendent, for the reason that the changes in the plans were not brought to his attention until the extra work was practically completed. Strimple & Son had run away from the city and could not be found, and Mr. Hellmers, the supervising architect, declined to sign any agreement or stipulation, or certify to the amount of the extra work. The law never requires the doing of impossible things. That part of the contract which contained the provision that "the superintendent's opinion, certificate, report, and decision on all matters to be binding and conclusive on the parties to the contract," could certainly not be construed to apply to Mr. Hellmers' testimony given upon the witness-stand. That clause

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could have meant nothing else than that during the progress of the work, if any dispute arose with regard to any material to be put into the building, or anything else in connection with it, the superintendent's opinion and decision was to be binding. .

THOMPSON, J., delivered the opinion of the court.

This action is brought by a subcontractor to enforce a mechanic's lien for certain plastering done by him on an addition to a building owned by the defendant Mrs. Beers. The original contractors made default and the plaintiff recovered a verdict and judgment against them, and also a verdict and judgment establishing his claim as a lien. The only struggle in the case related to the right of the plaintiff to establish his lien for such of the items in the account filed with his claim of lien as related to extra work, alleged by him to have been rendered necessary by changes made in the plans and specifications of the building, by the owner, the architect, and the original contractor. That such changes had been made and that he did a certain amount of extra work was uncontroverted. But the controversy was as to the amount of extra work rendered necessary by the changes, and as to whether he was entitled to any lien at all for the extra work. It stands in part admitted and in part proved without controversy, that he did all the plastering upon the building, under his contract with the original contractors for the erection of the building, who were J. Strimple & Son; that his work was well done; that the reasonable value of it was thirty-five cents per square yard, and that this reasonable value was not in excess of the price contracted for. J. Strimple & Son, the original contractors, after paying the plaintiff two thousand dollars, on account, absconded and left him and other contractors in the lurch as to what was due them. The plaintiff recovered a judgment by default against the original contractors, as previously stated, and also a judgment establishing his lien for so much of the agreed contract price of the work as

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remained unpaid, and also for the extra work claimed by him. From this judgment the defendant Mrs. Beers and her husband prosecute this appeal.

I. The first error which the appellants assign is, that the plaintiff was allowed to testify, for the purpose of proving the amount of extra work done by him, that he had used as the basis of his measurements tracings from the original plans annexed to the principal contract between Mrs. Beers and J. Strimple & Son, without requiring him to produce these tracings. The theory of this objection is, that the plans themselves were primary evidence of the facts testified to by the witness. We do not think that this objection is well taken. The plaintiff did not testify or offer to testify as to the contents or character of the tracings of the plans. He merely alluded to them in explaining the manner in which he had made his computations. Nevertheless, the defendants Beers could have put the plans, elevations, and drawings in evidence, if they had desired to do so for the purpose of showing that computations made from them as a basis would not have produced the result stated by the plaintiff in his testimony. This is not a case where a party seeks to prove the contents of a written instrument by secondary evidence. The plaintiff did not seek to prove by oral testimony the contents or character of the tracings. On this point counsel for the plaintiff has furnished us with an apt illustration of what seems to be the correct view; which is, to suppose that the plaintiff, instead of testifying as he did, had testified that he made the measurements with a yardstick belonging to the defendants. Would it have been necessary to procure their yardstick and offer it in evidence? Nor is this a case where oral evidence is introduced to vary a contract which parties have made. Both the original and the subcontract provided for extra work, and the question was as to the amount of the extra work which was in fact done. Moreover, before any objection had been made to this line of evidence, the defendants themselves drew out similar evidence on the cross-examination of Mr. Hellmers, their own architect and

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superintendent, who had been called as a witness by the plaintiff. He made his statement of measurements of the extra work done by the plaintiff which had been rendered necessary by an enlargement of the basement and closets after the making of the original plan and specifications, and his measurements, as well as those made by the plaintiff, were necessarily based on the plans and elevations.

II. The next assignment of error is, that the court erred in allowing evidence to be introduced touching the extras sued for. The subcontract which is the foundation of the action contained the following provision: "The superintendent, or J. Strimple & Son, shall be at liberty to make any deviation from, or alteration in, the plans, form, construction, detail and execution described by the drawings and specifications, without invalidating or rendering void this contract; and in case of any difference in the expense, an addition to or abatement from the contract price shall be made, and the same shall be determined by the architect, or J. Strimple & Son. And in case any such alteration or change shall be made or directed by the superintendent or owner as aforesaid, in the plans, drawings and construction of the aforesaid plastering, and in case of any omission or addition to said plastering being required by said superintendent or owners, the cost and expense thereof is to be agreed upon in writing, and such agreement is to be signed by said parties of the second part and party of the first part and the superintendent, before the same is done or before any allowance therefor can be claimed; and in case of any failure so to agree, the same shall be completed upon the original plan."

The original contract between Mrs. Beers and J. Strimple & Son contained in like manner a clause requiring the costs of any alterations to be agreed upon in writing beforehand and signed by J. Strimple & Son and the superintendent and making the superintendent's opinion, certificate, report and decision on all matters, binding and conclusive on J. Strimple & Son.

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No express agreement for the doing of extras, such as is provided for in the above subcontract, was ever made. The extra work was rendered necessary by increasing the height of the rooms and making other alterations. This was done without the knowledge of the plaintiff and without notifying him of the same, so far as appears. His contract with J. Strimple & Son was to do the whole plastering for a round sum. As it was a large job and he wanted to keep his hands employed, he had carefully estimated from the specifications the amount to be done, and had bid a low figure for the job. He had practically completed the job before he knew of the changes by reason of which he was doing more work than his original estimate required. The defendants Beers, by enlarging the height of the rooms and making other changes, increased the amount of the plastering to be done, allowed the plaintiff to go on with his job and received the benefit of the extra work which he did. This was a waiver on their part of the right to demand a strict compliance with the provision of a subcontract requiring the cost and expense of any alterations to be agreed upon in writing. Then, the evidence shows without contradiction that after J. Strimple & Son had left the city, the plaintiff made seasonable application to the architect to fix the quantity and price of this extra work, which he refused to do. It is now argued that as by the terms of the contract sued on, the price of the extra work was to be agreed upon in writing with J. Strimple & Son, and as they had absconded, it could not have been agreed upon according to the terms of the contract, and the court cannot set aside this provision of the contract. This does not seem to be a reasonable view to take of the matter. The plaintiff could not have been at fault for not insisting upon an agreement between the defendants' architect and the principal contractors before they left the state, because he did not then know that the alterations had been made under which he was doing more work than his contract contemplated. After J. Strimple &

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Son had absconded, he could not procure their written agreement in respect of the extra work. Is he, therefore, to lose his mechanic's lien for it while the defendants get the benefit of the work? The mechanic's lien law is to be reasonably and remedially construed for the purpose of accomplishing its objects, and under it the law certainly will not drive a subcontractor to do an impossible thing.

III. The next contention of the appellants seems to be still more untenable. Notwithstanding the defendants' architect refused the application of the plaintiff to state in writing or agree with him as to the price of the extra work, or to certify to the measurement of the same, it is now claimed that, under the last clause of the contract above quoted, the plaintiff is bound by the estimate which the defendants' architect subsequently made, and which he delivered for the first time, so far as appears, while testifying as a witness upon the trial of this cause; and the defendants asked, and the court refused, an instruction to this effect. This was no error. Having allowed him to go on with the work without informing him of the changes which entailed the doing of extra work, and having then, after the absconding of the principal contractors, refused to enter into an agreement with him as to the amount of the extra work, or the price thereof, it is too late for them now to claim that he is bound under the contract by the statements of their architect delivered upon the witness-stand.

IV. If we are right in the foregoing views, the trial court committed no error in giving the following instruction at the request of the plaintiff:

"6. The court instructs the jury that if they find, from the evidence, that the defendants, Joab Strimple and Benjamin F. Strimple, under the style of J. Strimple & Son, entered into the contract in evidence with defendants Harriet Beers and George S. Beers, to build for them, including the plastering and cornicing, the building known as Hotel Beers Addition; that afterwards the plaintiff entered into the contract in evidence

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with said Strimple & Son to furnish the labor and material necessary for the plastering and cornicing of said building under said original contract, and that afterwards certain alterations were made in the plans, so that the amount of labor and material necessary to complete said building in accordance therewith was increased; that such deviation or alteration was made without the knowledge of plaintiff, and was unknown to him until after most of said work was finished; that he requested the said Hellmers to agree with him in writing as to the amount and cost of said additional work and labor, and that the said Hellmers failed and refused to do so; and that the said Strimples had absconded from the city of St. Louis, and plaintiff was, therefore, unable to obtain from them a written agreement, as required by said contract, then the jury will find for the plaintiff for the reasonable value of said additional work, with interest from February 10, 1887. And if they further find that within four months after the completion of said work, plaintiff filed in the office of the clerk of the circuit court of the city of St. Louis a just and true account of said indebtedness due him, after allowing all just credits, giving the names of the contractors and owners and a full description of the property, verified by affidavit, and that, more than ten days before the filing of said account, plaintiff gave a written notice to the defendants, Harriet Beers and George S. Beers, Ephraim G. Obear and Meyer A. Rosenblatt, which notice contained a true statement of said demand, the amount thereof, from whom due, and a true description of the premises on which the lien was claimed, and of the plaintiff's intention to file such lien, and that this suit was commenced within ninety days after the filing of said lien, then their verdict should be that the plaintiff is entitled to a lien upon the property described in the petition, for the reasonable value of said additional work, with interest from February 10, 1887."

It was supported by substantial evidence, well drawn, and correct in point of law.

The judgment is affirmed. All the judges concur.

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36	527
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Luke McLaughlin, Respondent, v. Chris. Schawacker *et al.*, Appellants.

St. Louis Court of Appeals, June 5, 1888.

1. **Mechanic's Lien—Lumping Charge.** — An account filed for a mechanic's lien is not open to the objection that it makes a lumping charge, when it itemizes the charges according to the kinds of brick in the work and the number of each kind used.

2. **Mechanic's Lien—Account.**—A mechanic's lien account which contains a debit and a credit for the same item does not, therefore fail of being a just and true account, when the evidence shows that the item does not involve either a final debit or credit, and might, without affecting the rights of either party, have been left out of the account altogether.

3. **Mechanic's Lien—Verdict.**—It is no objection to a verdict declaring a lien, that improper items which are omitted from it are included in the personal findings against defendants who are not affected by the lien, and who have not appealed.

4. **Mechanic's Lien—Objectionable Items.**—A lien account is not vitiated by the fact that it contains items which are not included in the contract, when such items would be lienable if covered by the contract, and are severable from those within the contract.

5. **Mechanic's Lien—Request of Owner.**—It is not necessary in a suit by a subcontractor to aver in the petition that the materials were furnished or the labor performed upon request of the owner of the property.

6. **Practice—Improper Remark by Court.**—An objection that the court made an improper remark to the jury is not available on appeal, when it was not presented below in the motion for a new trial.

7. **Practice—Amended Petition—Notice.**—Parties already in court by sufficient service are not entitled to special notice or service of an amended petition.

Appeal from the St. Louis Circuit Court, Hon. George W. Lubke, Judge.

Affirmed.

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W. B. THOMPSON, for the appellants: The petition in this case is not sufficient under section 3176, of the Revised Statutes, to entitle the plaintiff to a mechanic's lien against the defendants' property, for the reason that the account set forth in the petition embraces labor, lime, brick, and other materials, and such a petition is open to the objection that it embraces a lumping charge. *Edgar v. Salisbury*, 17 Mo. 271; *Lewis v. Cutter*, 6 Mo. App. 54; *Kling v. Construction Co.*, 7 Mo. App. 411; *Cotling v. Nast*, 8 Mo. App. 573; *Russell v. Bell*, 44 Pa. St. 47; *Lee v. Berg*, 66 Pa. St. 336; Phillips' Mechanic's Liens, 489; *Hilliker v. Francisco*, 65 Mo. 598, 603; *Foster v. Wulfing*, 20 Mo. App. 85. It was error in the court below to proceed to a final judgment against the owner on the issue of the lien without service of the amended petition upon the contractors, and the objection to any testimony being introduced in support of the allegation of the amended petition, was for that reason, and for that alone, fatal to plaintiff's case, Rev. Stat., secs. 3205, 3207, 3209, 3210; *Horstkotte v. Menier*, 50 Mo. 158; *Janney v. Spedden*, 38 Mo. 395; *Ticknor v. Voorhis*, 46 Mo. 110; *Young v. Woolfolk*, 33 Mo. 110; *Skinner's Ex'r v. Hutton*, 33 Mo. 244; *Bayse v. Ambrose*, 28 Mo. 39; *Neidenburger v. Campbell*, 11 Mo. 351; *Foster v. Wulfing*, 20 Mo. App. 87. The petition fails to state a cause of action against the defendants' property to entitle the plaintiff to a mechanic's lien in this, that the petition fails to aver that there was any material, work, or labor performed by the plaintiff at the request of the defendants, or that the material was reasonably worth any prices set forth. *Heinrich v. Gymnastic Society*, 8 Mo. App. 588; *Burrough v. White*, 18 Mo. App. 229; *Graves v. Pierce*, 53 Mo. 423; *Lowis v. Cutter*, 6 Mo. App. 54; *Nelson v. Withrow*, 14 Mo. App. 270; *Gaus v. Hussman*, 22 Mo. App. 115. The petition failed to state a cause of action because there was no just and true account filed with plaintiff's petition, the petition itself

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showing the item on the debit side of the account, "To allowance made for shortage in building and walls, credit agreed to be given Schawacker, $117.64." On the credit side of the account, "Credit for shortage as above, $117.64," which of itself shows, without any further argument, that there was no credit given. The account made up of two lumping charges—first, the item of labor and materials, $426.57, which says, "Including brick, mortar, labor, and all materials"; another item of $3.063.40, "To labor and materials, including brick, mortar, labor, and all materials," are lumping charges on their face, and the subsequent parts and items of the account are made up in order to evade sections 3202 and 3216 of the Revised Statutes. By the confusion of this account the judgment also includes 7,800 brick, which was not embraced in the contract price on the theory that the walls of the building were to be six feet longer than they were constructed, at $12.50 per thousand, amounting to $97.50. *Murphy v. Murphy*, 22 Mo. App. 18; *Gauss v. Hussman*, 22 Mo. 115; *Henry v. Rice*, 18 Mo. App. 510; *Schulenberg v. Prairie House*, 65 Mo. 295; *McWilliams v. Adams*, 45 Mo. 573, 575; *Coe v. Ritter*, 86 Mo. 277, 287; *Johnson v. Building Co.*, 23 Mo. App. 546. In order to establish a mechanic's lien against the property of the defendant, the statutory requirement that the lien must set out the items of the account cannot be cured by oral evidence to show that all of the items of mortar, labor, and all materials can be included in one charge; the lien claim must set out the items, though the contract is for a gross sum. The testimony of the plaintiff's witnesses was an attempt to explain the two lumping charges in plaintiff's lien claim, but in all of these cases the witnesses testified that all of the items could be separated, and that the charge was made in a lump, and included the several items. *Kling v. Construction Co.*, 7 Mo. App. 410; *Nelson v. Withrow*, 14 Mo. App. 270; *McWilliams v. Adams*, 45 Mo. 573, 575; *Coe v. Ritter*, 86 Mo. 277, 287; *Johnson v. Building Co.*, 23

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Mo. App. 546. The comment of the court at the trial of this case, in the presence of the jury, in the following words: "You are entitled to no credit when you repudiate the contract and insist upon their proving the reasonable value," was not only error, but it was calculated to shield the plaintiff's false and fictitious account. Rev. Stat., sec. 3172; *Henry v. Rice*, 18 Mo. App. 510; *Garnett v. Berry*, 3 Mo. App. 202; *Barker v. Berry*, 8 Mo. App. 446; *Planing Mill Co. v. Brundage*, — Mo. App. 275.

CAMPBELL & RYAN, for the respondent: Service of the amended petition upon defendants Dempsey and Schawacker was not necessary. *City v. Gleason*, 15 Mo. App. 25, 29. The amended petition was filed within ninety days after the lien was filed, and this was as to the defendant Davis a commencement of this suit; that the writ issues subsequently makes no difference. *Gosline v. Thompson*, 61 Mo. 471. The exception made by appellant at the trial to language of the court (which we say was not prejudicial to his case) cannot be urged here, as it was not saved in the motion for a new trial. This is a "well-settled rule of practice" in our appellate courts. *Railroad v. Clark*, 68 Mo. 371, 374; *McCord v. Railroad*, 21 Mo. App. 92, 96; *Simpson v. Schulte*, 639, 642. The point most urged by appellant is that the lien account was insufficient. It was sufficient under the rulings of this and other courts of authority. *Johnson v. Building Co.*, 23 Mo. App. 547; *Hayden v. Wulfing*, 19 Mo. App. 365; *Pue v. Hetzell*, 16 Md. 548; *Shaw v. Barnes*, 5 Barr (Pa.) 18; *Donahoe v. Scott*, 12 Pa. St. 45; *Knowlay v. Ellis*, 12 Phil. 396; *Ricker v. Jay*, 72 Maine, 107; *Nelson v. Withrow*, 14 Mo. App. 270, 277; *Lowis v. Cutter*, 6 Mo. App. 54, 56; *Kling v. Construction Co.*, 7 Mo. App. 410, 411; *Codling v. Nast*, 8 Mo. App. 573. The mechanic's lien statute is highly remedial in its nature, and should receive a liberal construction to advance the just and beneficent objects had in view in its passage. *De Witt v. Smith*, 63 Mo. 263;

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Hayden v. Wulfing, 19 Mo. App. 357. The complaint about the item of $117.64 is not well taken. Whether or not each item in the account is a charge on the building could be determined by inspecting same. Unless lien and non-lien items are so mingled as to be inseparable the account is a good lien account, to the extent of the items which constitute a charge on the property. *Johnson v. Building Co.*, 23 Mo. App. 546, 549; *Kershaw v. Fitzpatrick*, 3 Mo. App. 575; *Edgar v. Salisbury*, 17 Mo. 273.

Thompson, J., delivered the opinion of the court.

This is an action by a subcontractor to recover a balance due from a firm of principal contractors and to establish a mechanic's lien for such balance against a lot of ground and a building. The original petition was filed on the nineteenth of May, 1887, and the principal contractors, Dennis Dempsey and William J. Dempsey, and also the owner, Christopher Schawacker, were made defendants. Personal service was had upon each of these defendants. On the sixteenth of July, 1887, two other defendants, Maria W. Johnson and John H. Tennent, entered their appearance, and the plaintiff, by leave of court, filed an amended petition, and on his motion summons was ordered for the other defendants, Mathilda Davis, James S. Davis, her husband, and James S. Davis as trustee for Mathilda Davis. In accordance with this motion, summons was issued for the last-named defendants on the eighteenth of July, which was returned duly executed. The amended petition was not served on the defendants Dennis Dempsey and William J. Dempsey. These defendants filed no answer. The other defendants jointly answered by a general denial, followed by a special traverse of the essential allegations of the amended petition, and an averment that the plaintiff had failed to comply with the statutes in reference to mechanic's liens by filing a

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just and true account of any work or materials furnished, etc. The original petition is not set out in the record, so that it does not appear that it was in any respect different from the amended petition except in respect of the additional defendants. A default was taken against the defendants Dennis Dempsey and William J. Dempsey. There was a trial by a jury of the issues made by the amended petition and the answer of the other defendants, which resulted in a verdict and judgment against the defendants Dennis Dempsey and William J. Dempsey in the sum of $1,162.74, and a finding that the plaintiff had established a mechanic's lien on the building and lot in the sum of $1,008.47, subject to a prior lien in favor of the defendant Maria N. Johnson, for the amount due under a certain deed of trust. After an unsuccessful motion for a new trial, the defendants, other than Dennis Dempsey and William J. Dempsey, prosecute this appeal. The record is voluminous. The points insisted upon by the appellants are the following:

I. That the petition is not sufficient, under section 3166, Revised Statutes, to entitle the plaintiff to a mechanic's lien, for the reason that the account therein set forth embraces labor and lime, brick and other materials, and the petition is open to the objection that it embraces a *lumping charge.* This account was as follows:

"January 19, 1887.

"To contract price for brick-work on building, 414 South 3rd street, St. Louis, under contract with William Dempsey and D. J. Dempsey.......................$5,738 00

"These labor and materials furnished from September 30, 1886, to and including January 19, 1887. (Made up as follows):

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"To labor and materials in furnishing and putting into building of Chris. Schawacker, 414 South 3rd street, St. Louis, Mo. (including brick, mortar, labor, and all materials), 10,156 stock brick at $42.00 per M.		426 57
To labor and materials in furnishing and putting into same building (including brick, mortar, labor, and all materials) 245,073 hard red brick at $12.50 per M.		3,063 40
To hauling scaffolding for work on said building		20 00
To use of scaffolding on work on said building		85 00
To red paint used in said building, four barrels		25 39
To allowance made for shortage in building and walls, credit agreed to be given Schawacker		117 64
		$3,738 00
Credits:—		
Cash by order Dec. 11, '86.	$ 500 00	
Cash by order Dec. 17, '86.	800 00	
Cash by order Dec. 27, '86.	1,200 00	
Credit for shortage as above.	117 64	$2,617 74
		$1,120 36"

The ground on which it is claimed that the above account embraces a lumping charge of several materials is that it does not separate the amount due for brick from the amounts due for mortar, for other materials, and for labor. We do not think that the account is open to this objection within the meaning of the decisions which bear upon this question. The account is framed with the view of making separate charges for two classes of brick laid in the wall, according to what is known as

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"wall measurement," which is the measurement established by statute. Acts of 1885, p. 200, sec. 3. It charges for certain brick work, itemized according to kinds of brick and number of each kind used. This is sufficient under several decisions. *Hayden v. Wulfing*, 19 Mo. App. 353; *Johnson v. Building Co.*, 23 Mo. App. 546.

II. It is next objected that the petition fails to state a cause of action, because the account annexed thereto was not a just and true account, within the meaning of section 3176, Revised Statutes. This objection is based upon the following grounds: That there is an item on the debit side, "To allowance made for shortage in building and walls, credit agreed to be given Schawacker, $117.64"; that on the credit side of the account there is a "credit for shortage as above, $117.64," from which it is argued that no credit was given; and that, in order to fill out the amount of the contract price of the brick work on the building, which was $3,738, it was necessary to charge up the following items:

"To hauling scaffolding for work on said building	$ 20 00
To use of scaffolding on work on said building	85 00
To red paint used in said building, four barrels	25 39
To allowance made for shortage in building and walls	117 64
Making a total of	$248 03"

We think these objections untenable. The objection that the item for shortage is on both the debit and the credit side of the account is merely specious, since it is not necessary to put such an item in the account at all; in fact, it is not an item. It was evidently placed there by the draughtsman of the account on the conception of showing how much was allowed for shortage in the building and walls. Precisely the same balance would have been arrived at if the plaintiff had drawn

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his account without saying anything about the contract price or the shortage, but charging the other items on the debit side and giving on the credit side the credits which are given, except the credit for shortage. As to the other items charged for and objected to, it is sufficient to say that under the instructions of the court the jury rejected them from the amount for which their finding established the lien against the property, although they included them in their finding against the Dempseys. But as the Dempseys do not appeal, there is nothing in respect of those items of which the appellants can complain, unless their mere presence in the account, as filed with the claim of lien, prevents it from being the "just and true account" prescribed by the statute. The setting out of the items which the jury, under the instructions of the court, rejected from the lien, did not vitiate the account or destroy the lien; because they were separately set out and were not so mingled with the other items as to be incapable of separation therefrom, within the meaning of *Nelson v. Withrow*, 14 Mo. App. 270, 277, and other cases of that class. The mechanic's lien law is to be construed remedially (*Hayden v. Wulfing*, 19 Mo. App. 357, and cases cited); and it would defeat the policy of the law and lead to unjust results if the lien claimant were to lose his lien by mistake in inserting therein certain items which were not lienable. In *Johnson v. Building Co.*, 23 Mo. App. 546, it was held that a lien is not vitiated because the account filed by the subcontractor includes charges for work not included in the contract, but which would be a proper subject of lien if included in the contract, where the improper items are severable from the other parts of the account. We see no reason why the same principle should not be extended to a case where non-lienable items are included in the account by mistake, but stated separately, as, for instance, the items in this account for hauling scaffolding and for the use of scaffolding, assuming them to be non-lienable items. They are probably lienable items, since they

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may either be reasonably supposed to fall within the designation of "work or labor done" or "material furnished" for a building, within the language of section 3172, Revised Statutes. But if they were non-lienable items, the purpose of the statute in requiring a just and true account to be filed would not be defeated by their presence, since every person is presumed to know the law; and the land-owner, by a mere inspection of the account, could readily conclude what items would carry the lien claimed and what would not—which would satisfy the reasoning of *Nelson v. Withrow*, *supra*.

III. Another objection is made to the petition, which is that it fails to aver that any material, work or labor was furnished by the plaintiff at the request of the defendant, or that the material for which the lien is claimed was reasonably worth the prices charged for it. The first clause of this objection is bad in law, and the second in fact. It is not necessary, in the petition of a subcontractor, to enforce a mechanic's lien, to aver that the materials were furnished at the request of the owner of the property. He states a case entitling him to a lien within the statute, when he states that the materials were furnished at the request of the principal contractor and under a contract between the principal contractor and the owner; and that is stated in this petition. It is a mistake in point of fact to assume that the petition does not state that the material was reasonably worth the prices set forth. It contains the following allegation: "Plaintiff says that the material, work and labor furnished, as above set forth, in the account hereinafter copied into this petition—that all of said material, work and labor were actually used in and upon said building, and were reasonably worth the prices charged in said account."

IV. The next objection, marked V., in the appellants' printed argument, may be resolved into an objection to the course of the trial, which, as is argued, allowed the introduction of parol evidence to cure what

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the appellants regard as defects in the account,—showing the separate items of mortar, labor, and materials which were included in the two principal charges. This is disposed of in the observations already made concerning the account itself. As the account was sufficiently explicit to satisfy the statute, this evidence, which further particularized, did no possible harm to the defendants; but in fact most of it was brought out by them, and they make a very considerable argument to show that the verdict is incorrect upon the evidence thus adduced. This argument seems to be predicated upon the conception that the plaintiff was entitled only to the reasonable value, within the limits of the contract, of the brick which went into the wall, according to kiln count, and not according to wall measurement. But the jury took a different view, and their finding is supported by substantial evidence. The plaintiff introduced evidence of experts who measured the building, to the effect that the amount of brick of the two kinds charged for had been actually put into the wall according to wall measurement, and his evidence tended to show that the charges made were reasonable. The amount for which the verdict gives a lien is made up of the aggregate of the two items of stock brick and hard red brick at the prices named, after deducting twenty-five hundred dollars, the aggregate cash payments which the plaintiff had received, and computing interest upon the residue from the date of the filing of the original petition to the date of the verdict. This finding was within the evidence and cannot be disturbed here.

V. There is an objection to an observation made by the court in the presence of the jury, claimed to have been prejudicial to the appellants; but, as this was not renewed in the motion for new trial, it is not available on appeal. *McCord v. Railroad*, 21 Mo. App. 92; *Bevin v. Powell*, 11 Mo. App. 216, 220.

VI. Another objection is, that the trial court proceeded to final judgment against the owner of the land

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and building, on the issue of the lien, without the service of the amended petition upon the contractors, notwithstanding the objections of these appellants. This assignment of error is answered by the ruling in *St. Louis v. Gleason*, 15 Mo. App. 25, 29. They were in court already.

We see no prejudicial error in the record, and the judgment is accordingly affirmed. All the judges concur.

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PETER WELSH, Respondent, v. JAMES STEWART *et al.* Appellants.

St. Louis Court of Appeals, June 5, 1888.

1. PRACTICE—INSTRUCTION—EXEMPLARY DAMAGES.—When a petition is framed strictly on the theory of compensation only, and states no case under the law for a recovery of exemplary damages, it is error to instruct the jury on any hypothesis for an award of exemplary damages.

2. PRACTICE—INSTRUCTION—TRESPASS.—An instruction declaring the law to be "that no person shall enter upon land or tenements in the possession of another except such entry is given by law, and then only in a peaceable manner," states the law correctly and appropriately in an action to recover damages for such an entry and is not objectionable as a mere abstract proposition, when introductory to language which applies the proposition to the hypothetsis of fact furnished by the plaintiff 's evidence.

3. PRACTICE—DIFFERENT CAUSES OF ACTION IN THE SAME COUNT. When two causes of action are blended in a single count of the petition, the defendant must object either by a motion to compel the plaintiff to elect between them, or by a demurrer, and cannot take advantage of the irregularity after verdict, by a motion in arrest.

4. TRESPASS—UNAVAILABLE DEFENCE.—It is no answer to an action for a trespass, that the defendant was acting as agent or contractor for another. In such cases, all participants are liable as principals.

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APPEAL from the St. Louis Circuit Court, HON. DANIEL DILLON, Judge.

Reversed and remanded.

FISHER & ROWELL, for the appellants: The court below erred in instructing the jury that they might give vindictive damages. The evidence did not warrant such an instruction, and it greatly prejudiced the defendants' case. *Joice v. Branson*, 73 Mo. 28; *Whalen v. Church*, 63 Mo. 326; *McKeon v. Railroad*, 42 Mo. 79, 85, 86; *Merrill v. City*, 12 Mo. App. 466; *Morgan v. Durfee*, 69 Mo. 478; *Railroad v. Quigley*, 62 U. S. 214; *Eddleman v. Transfer Co.*, 3 Mo. App. 507; *Kennedy v. Railroad*, 36 Mo. 365; *Hawkins & Co. v. Riley*, 17 B. Mon. 101; Field on Damages, secs. 23, 25, 26, 69, 70, 71, 116; Cooley on Torts, 692, 694; 2 Greenl. Evid., secs. 270, 272. Instruction number three, given for plaintiff, should not have been given. Besides declaring for vindictive damages, it contains legal propositions and terms calculated to mislead the jury. *Wiser v. Chesley*, 53 Mo. 547; *Digby v. Ins. Co.*, 3 Mo. App. 603; *Atteberry v. Powell*, 29 Mo. 429; *Dyer v. Brannock*, 2 Mo. App. 432; *Mueller v. Ins. Co.*, 45 Mo. 88; *McDermott v. Donegan*, 44 Mo. 91; *Huffman v. Ackley*, 34 Mo. 277; *Turner v. Loler*, 34 Mo. 461; *Franz v. Hilderbrand*, 45 Mo. 121. Instructions one, three, and four, given for plaintiff, conflict with those given for defendants, and entirely ignore the grounds of the defence. It was, therefore, error to give them. *Henschen v. O'Bannon*, 56 Mo. 289; *Buel v. Trans. Co.*, 45 Mo. 562; *Ott v. Bent*, 48 Mo. 23; *State v. Nauert*, 2 Mo. App. 295. Instruction number three, offered by defendants and refused, should have been given. If defendants were employed and directed to take down the building in question, by the owner McLean, and landlord of plaintiff, then McLean, and not these defendants, was liable to plaintiff. The court below erred in not giving instruction number five refused. The defendant Stewart is not liable. He was

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not present when the alleged trespass was committed, and gave no directions to any one in regard to it, and was not represented, even by an employe. Under the whole evidence the verdict should have been for him, and the court should have so instructed. It was error for the jury to return a verdict for a lump sum. They should have assessed the damages to property and person and for punishment separately. And for their failure to do so the motion in arrest of judgment should have been sustained. *Brunsden v. Humphrey*, 14 Q. B. Div. 141; *Homes v. Sheridan*, 1 Dillon's C. C. (U. S.) 351; *Scott v. Robards*, 67 Mo. 291; Pomeroy's Remedies and Remedial Rights, 494; *Bricker v. Railroad*, 83 Mo. 391; *State ex rel. v. Dulle*, 45 Mo. 271; *Pitts v. Fugates*, 41 Mo. 405; *Mooney v. Kennett*, 19 Mo. 553; *Clark's Adm'r v. Railroad*, 58 Mo. 396; *Cattell v. Dispatch Co.*, 15 Mo. App. 587.

A. R. TAYLOR, for the respondent: In all cases of wilful trespass upon a party's premises, and especially coupled with the destruction of his property, the law awards punitive damages. *Von Frorstein v. Windler*, 2 Mo. App. 598; *Peckham v. Glass Co.*, 9 Mo. App. 463. There was but one invasion of plaintiff's right, the wrongful entry and trespass; all the injury directly caused by the trespass is but the damage from the single wrong. Our courts have repeatedly held that injury to person and property by the same wrong constitute but one cause of action. *Von Froystein v. Windler*, 2 Mo. App. 598; *Peckham v. Glass Co.*, 9 Mo. App. 463; *Stickford v. City*, 7 Mo. App. 217; s. c. affirmed, 75 Mo. 309.

THOMPSON, J., delivered the opinion of the court.

This was an action for damages for a trespass. The plaintiff had a verdict and judgment, from which the defendants appeal.

The case stated in the petition was that the plaintiff occupied certain premises for business purposes, and

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while lawfully in possession thereof, the defendants, with force and arms, wrongfully and unlawfully entered upon them and tore them down, causing a large amount of dirt, timbers, and *débris* to fall into the building, breaking and defacing the plaintiff's furniture and injuring him in his person; and the petition states the personal injuries at ten thousand dollars, and the injuries to the property at five hundred dollars, and claims judgment in the sum of ten thousand and five hundred dollars. The answer was merely a general denial and a plea of contributory negligence. The evidence of the plaintiff tended to show that he had long been a tenant of the tenement in question, under a verbal letting by Dr. McLean, the owner; that Dr. McLean employed the defendants to tear down the building for the purpose of making improvements, and that they began tearing it down while the plaintiff was still in it, inflicting upon him the injuries complained of. The evidence adduced by the defendants was to the effect that the plaintiff, having received notice from Dr. McLean of his intention to tear down the building for the purpose of making the improvements, agreed with Dr. McLean that the work might go on, and that he, the plaintiff, would either move out, or, if he remained in it, take his chances of injury. The errors assigned are of such a nature that it seems unnecessary to enlarge upon the evidence beyond this meager statement.

I. The first assignment of error is, that the court erred in instructing the jury that if they should believe that the defendants, in committing the trespass, were actuated by ill-will against the plaintiff, or by a wilful disregard of the plaintiff's rights, they might award exemplary damages. The contention is that there was no evidence which rendered an instruction upon the subject of exemplary damages appropriate. On this question the members of the court are not quite agreed except as to the result. My associates are of the opinion that the evidence does not warrant the giving of such damages against either defendant. Upon this point I am not

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prepared to say that I agree with them, but I do not think it necessary or proper to state the reasons of my disagreement further than to say that it seems to me that the plaintiff's evidence, if believed, makes out a case upon which he is entitled to take the opinion of the jury on the subject of exemplary damages, within the reasoning of the Supreme Court in *Goetz v. Ambs*, 27 Mo. 29, which is our leading case on the subject. I do not think that there is any evidence of ill-will on the part of the defendants against the plaintiff, which is one of the hypotheses in the above instruction. But I am not clear that we can say upon this record that the amount of damages to property which the plaintiff rehearses, assuming his evidence to be true, could have been committed without "a wilful disregard" of his rights. My associates find support for their conclusion in the consideration that there is no evidence showing that the plaintiff ever advised the defendants, while the mischief was going on, that he was still on the premises or that either of them knew that such was the fact, or that the plaintiff advised them that his property was endangered by what they were doing; and further, that his own evidence showed that he did not request them to stop tearing down the building. But I do not see how they could commit the amount of mischief which he describes without knowing that they were doing it; nor do I agree to the view that where a body of men tear a man's house down over his head, committing such an amount of injury to his property as the plaintiff describes, the principal actors are not liable for exemplary damages by reason of the fact that the householder does not solicit them to desist.

The grounds on which exemplary damages may be awarded have been pretty clearly set forth in this state, though not with entire uniformity, by a long line of decisions. In *Goetz v. Ambs*, *supra*, the right to such damages is predicated upon the fact of the trespass being "wilful or intentional," in which case the court say, "the idea of compensation is abandoned, and that of

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punishment is introduced." In *Kennedy v. Railroad*, 36 Mo. 365, it is said that, "to authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy and form one of the chief ingredients; the act complained of must partake something of a criminal or wanton nature." In *McKeon v. Railroad*, 42 Mo. 87, it is said that, "such damages certainly can be given, if ever, in a civil case, only where the injury is intentionally, wilfully, and maliciously done." In *Franz v. Hilterbrand*, 45 Mo. 123, it is said: "Where there are no circumstances of aggravation, the damages should be compensatory only. Where, however, the act is aggravated, and where there has been fraud, oppression, malice, or gross negligence, a different rule is adopted, and the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender." In *Engle v. Jones*, 51 Mo. 316, it is said: "Unless the trespass is committed in a wanton, rude, or aggravated manner, indicating oppression, malice, or a desire to injure, the damages should be compensatory only." In *Doss v. Railroad*, 59 Mo. 33, it is said that, "where the agents of a corporation act wantonly or maliciously, the corporation may be held to answer in exemplary damages." In *Brown v. Plank Road Company*, 89 Mo. 155, which was an action for damages grounded upon negligence, the judgment was reversed, because among other errors, the court gave an instruction authorizing the award of exemplary damages, whereas there was "nothing in the evidence to show that the failure of defendant to remove the obstruction thus occasioned was either wanton or malicious, one or the other of which elements must appear to justify the awarding of punitive damages." This decision, it is perceived, abandons the conception of the court in *Franz v. Hilterbrand*, *supra*, that such damages may be given in the case of gross negligence. In view of this last decision, the members of the court do

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not disagree upon the question that, in order to authorize the giving of exemplary damages, the injury must be "either wanton or malicious"; but, disagreeing, as already stated, in regard to the application of this principle to the evidence in the present case, the judgment of the court nevertheless is that the trial court erred in giving the instruction above stated.

But we are all agreed that in this case no instruction authorizing exemplary damages should have been given, for the reason that the petition does not state a case which will support the recovery of such damages, and it is a rule in this state that it is error to give instructions upon a state of case not made by the pleadings. *Melvin v. Railroad*, 89 Mo. 106; case cited in 2 Stark. Dig. 325, pl. 70. We, of course, do not wish to intimate that it is necessary for the plaintiff, in order to have an award of exemplary damages, to claim such damages *by name* in his petition. But this petition is framed strictly on the theory of compensation. It does not charge malice or wantonness; nor does it in any form of language state that the entry made by the defendants upon plaintiff's premises took place under the circumstances in which the law allows exemplary damages, within the meaning of the cases already cited. It was, therefore, error to give the above instruction, and for this reason the judgment must be reversed.

II. The next objections relate to other instructions. These seem to have submitted the case fairly to the jury upon the hypotheses of fact furnished by the evidence of the opposing parties. We see no substantial contradiction in them. The second instruction tendered by the defendants and refused, presented their defense in terms which were substantially embodied in the first instruction presented by them and given. Indeed, the proposition of fact embodied in this instruction, that if the plaintiff consented to the tearing down of the building and agreed to remain in and take his chances he could not recover, was given in various forms in no less

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than six different instructions tendered by the defendants. There is certainly nothing in the court's action upon this branch of the case of which they can complain. They tendered no less than sixteen instructions. The case was a very simple one, such as did not require numerous instructions in order to make it understood by the jury; and, on well-settled principles, the court might have refused all of them by reason of their very number. We see no error in so much of the third instruction given for the plaintiff as reads as follows: "The court instructs the jury that the law is that no person shall enter upon land or tenements in the possession of another except such entry is given by law, and then only in a peaceable manner." This is certainly the law, and as this was an action for damages sustained by the plaintiff in consequence of such an entry, it was appropriate to the case before the court. Nor was it an abstract instruction, because it was introductory to the language which followed in the same paragraph, which applied this proposition of law to the hypotheses of fact furnished by the plaintiff's evidence.

III. A more substantial objection is, that the petition contained two causes of action blended in a single count, one for an injury to the person, and the other for an injury to the property, of the plaintiff; but that the jury were, nevertheless, allowed to return a verdict in a round sum without assessing damages under each separate cause of action. It is to be observed that this question was not raised except by a motion in arrest of judgment. The settled rule in this state is, that where several causes of action are stated in the petition in as many counts, the jury must return a distinct finding under each count, and an assessment of damages in a lump sum will be a bad verdict on a motion in arrest of judgment. *Owens v. Railroad*, 58 Mo. 394; *Bigelow v. Railroad*, 48 Mo. 510; *State ex rel. v. Dulle*, 45 Mo. 271; *Clark's Adm'r v. Railroad*, 36 Mo. 215; *Mooney v. Kennett*, 19 Mo. 551. But this rule has no application to a case where two causes of action are blended in

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a single count. In such a case, the defendant must object seasonably to the petition, either by a motion to compel the plaintiff to elect for which cause of action he will proceed, as was reasoned in *Mooney v. Kennett*, *supra*, or by demurrer for misjoinder, according to the suggestions of later cases; and if he fail to do this, he cannot take advantage of the irregularity by a motion in arrest of judgment challenging the verdict. This was distinctly ruled in *Pickering v. Telegraph Co.*, 47 Mo. 457; *House v. Lowell*, 45 Mo. 381; *Peckham v. New Lindell Glass Co.*, 9 Mo. App. 463; *Dailey v. Houston*, 58 Mo. 361; *Fadley v. Smith*, 23 Mo. App. 87; *Baker v. Raley*, 18 Mo. App. 567; *Union Bank v. Dillon*, 75 Mo. 380. The true rule seems to be that laid down by the Kansas City Court of Appeals, in *Fadley v. Smith*, *supra*, that where the separate causes of action, which have been improperly blended in one count in the petition, are such as may be joined in the same action, the remedy of the defendant is by motion to compel the plaintiff to elect upon which cause of action he will proceed; that where the causes of action thus improperly blended are such as *cannot* be joined in the same action, the remedy of the defendant is by demurrer; and that, in either event, the objection is waived if not thus taken before the trial. We have looked at the decision of the late Supreme Court Commission in *Bricker v. Railroad*, 83 Mo. 391. That was an action which was commenced before a justice of the peace, and the conclusion therein reached is supportable on the ground that the pleader intended to state different causes of action in different counts. The *dictum* in the opinion, intimating that it would make no difference if they were blended in the same count, has not been overlooked by us. But we cannot suppose that it was the intention of the Supreme Court, in adopting that opinion of the commission, to overrule the mass of authority above cited upon this question of practice, and to reinstate the rule of previous cases, themselves overruled—thus throwing our practice in this regard into a

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state of confusion, and without even citing the cases intended to be overruled.

IV. The objection that the court should have given an instruction tendered, to the effect that the defendant Stewart was not liable, may be disposed of by Mr. Stewart's own evidence, which was to the effect that he was the contractor for tearing down the building, and that defendant Mills was employed by him. It seems scarcely necessary to refer to the well-known principle of law that all who participate in the commission of a trespass, whether employer or employed, are liable as principals. The circumstance that the building belonged to Dr. McLean, and that he contracted with the defendant Stewart to tear it down, cuts no figure in the case. In cases of nonfeasance, an agent is liable only to his principal; but in cases of malfeasance, or trespass, he is liable to the person injured, and cannot shield himself by proving that he committed the trespass under a contract with some one else.

With the concurrence of all the judges, the judgment will be reversed and the cause remanded. It is so ordered.

STATE to use of GODDARD, PECK & COMPANY, Appellant, v. M. M. RAYBURN *et al.*, Respondents.

St. Louis Court of Appeals, June 12, 1888.

1. PRACTICE—MOTION AFTER VENUE CHANGED.—When a cause has been removed by change of venue to another court, a motion in the court which has thus lost its jurisdiction has no standing or validity for any purpose, and should not be admitted in evidence by certified transcript on the trial of the cause in the proper court.

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2. PRACTICE—AMENDMENT—JURISDICTION.—The court from which a cause has been removed to another by change of venue, has no jurisdiction to permit the sheriff to amend his return on the original process; and an order so made is void, and not admissible in evidence. The court having possession and jurisdiction of the cause for the time being is the only one that can authorize such an amendment.

3. EVIDENCE—PART OF DEPOSITION.—It is error to permit the reading of parts of a deposition, and to refuse to compel the party offering it to read the whole upon demand of the adverse party.

4. EVIDENCE—TRANSCRIPT ON CHANGE OF VENUE.—A transcript filed in a court to which the cause has been removed by change of venue becomes a record of that court, and a duly certified transcript thereof is competent as evidence, not liable to the objection that it is a copy of a copy.

5. PRACTICE—INSTRUCTION.—An instruction which submits to the jury a question of law is properly refused.

APPEAL from the Butler Circuit Court, HON. JOHN G. WEAR, Judge.

Reversed and remanded.

HOUCK & KEYTON and THOMAS METCALF, for the appellant: The court erred in rejecting as evidence that part of the transcript in the case of Goddard, Peck & Company *vs.* Spiller, Haynes & McRee, that was a copy of the transcript of said case sent from Dunklin county to Stoddard county, on the ground that it was a copy of a copy. The transcript from Dunklin county, when filed in the circuit court of Stoddard county, became a record of that court, and a transcript of such transcript if made out by the clerk and duly certified, is certainly entitled to as much credit as a transcript of the declaration and other pleadings filed in the cause; and the objection, that so much of said transcript as was a copy of a copy was not admissible, is not tenable. *Bettis v. Logan*, 2 Mo. 4. It was certainly erroneous to allow defendants' counsel to read such parts of his depositions as suited his case, and to leave out and refuse to read other parts that were not favorable to his clients.

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The order of court allowing the amendment, the amendment itself, and the whole proceeding was absolutely null and void, and was not competent evidence for any purpose whatever. *Brown v. Woody, Adm'r*, 64 Mo. 550. From the time that a change of venue is ordered the court to which the case is sent has jurisdiction. *State v. Hopper*, 71 Mo. 425; *In Matter of Whitson's Estate*, 89 Mo. 58; *State v. Daniels*, 66 Mo. 192; *Berry v. Railroad*, 64 Mo. 533; *Stanley v. Railroad*, 62 Mo. 508. If the Dunklin circuit court had had jurisdiction of said case, it could not have allowed said amended return or ordered it made, as it had no legal right or authority so to do. Amendments of process, and returns after judgment has been rendered in a case, can only be made in furtherance of justice and in support of the judgment, and cannot be made when it works injustice and destroys the judgment. Rev. Stat., 1879, sec. 3570; *Stewart v. Stringer*, 45 Mo. 113; *Magrew v. Foster*, 54 Mo. 258; *Corby v. Burns*, 36 Mo. 195; *County v. Lowry*, 9 Mo. 21.

S. M. CHAPMAN, for the respondents: There was no error in rejecting that part of the transcript, in the case of Goddard, Peck & Company *vs.* Spiller, Haynes & McRee, offered in evidence by plaintiffs, which was shown to be "a copy of a copy;" especially, as the original, from which the alleged "copy" purported to have been made was subsequently put in evidence by them. That the original, or a duly certified copy, is better evidence than a "copy of a copy" admits of no discussion. It is a familiar rule in the production of evidence, that a party cannot prove his case by inferior evidence, while holding in reserve original and more primary sources of proof. Greenl. on Evid., secs. 82, 84; *Cloud v. Hartbridge*, 28 Ga. 272; *Bird v. Bird*, 40 Me. 392; *Torrey v. Fuller*, 1 Mass. 524; *Putnam v. Goodall*, 31 N. H. 419. It is urged that the circuit court of Dunklin county had, by reason of the change of venue, no

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jurisdiction to make the amendment. Had the amendment been such as to affect the judgment, there would have been more reason for contending that the amendment should have been made in the court in which the judgment was rendered. This court has held, in this case, that: "The attachment, with the sheriff's return thereon, was one of the records of the circuit court" of Dunklin county; and that an application to amend the return should be made in that court. 22 Mo. App. 303. *Brown v. Wood*, 64 Mo. 550, simply asserts that: "Jurisdiction must be shown by the whole record, and when it appears from it that the court had no jurisdiction, either over the person or subject-matter, the judgment rendered in such case is void." But if the judgment, says NORTON, J., "shows that the court had jurisdiction over the subject-matter of the suit to which it related, it was properly admitted in evidence, as the appearance of defendant to the merits of the action waived the question of jurisdiction over the person." *State v. Hopper*, 71 Mo. 425, and the cases cited to establish that: "From the time that a change of venue is ordered the court to which the case is sent has jurisdiction," asserts a proposition neither questioned nor involved in this case. A sheriff may amend his return after going out of office. *Adams v. Robinson*, 1 Pick. 461, 462; *Thatcher v. Miller*, 11 Mass. 413, 414. In *Baxter v. Rice*, 21 Pick. 199, SHAW, C. J., continued a cause in the Supreme Court to permit a sheriff to amend his return of service. The granting leave to make the amended return, "in accordance with the facts," finds ample support in principle, as well as in the adjudged cases. Rev. Stat., sec. 3567; *Blaisdell v. Steamboat*, 19 Mo. 157, 158; *Miles v. Davis*, 19 Mo. 408, 414; *Kitchen v. Reinsky*, 42 Mo. 427, 436; *Phillips v. Evans*, 64 Mo. 23; *Corby v. Burns*, 36 Mo. 195, 196; *Webster v. Blount*, 39 Mo. 500; Murfree on Sheriffs, secs. 879, 880.

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PEERS, J., delivered the opinion of the court.

This is an action upon the official bond of the defendant Rayburn as sheriff of Dunklin county, Missouri, for neglect of duty as such sheriff in releasing books and accounts from attachment levy in a proceeding in favor of these plaintiffs and against Spiller, Haynes & McRea. Plaintiffs asked judgment for the penalty of the bond to be satisfied by the payment of their original judgment of $1,535.32, and costs.

The record shows this cause to have been commenced in Dunklin county at the November term, 1882, some time after plaintiffs had obtained their judgment in the original attachment suit, and upon the application of the plaintiffs was transferred by change of venue to the circuit court of Butler county for trial, where it was tried in November, 1884, and resulted in a verdict and judgment for defendants, which judgment was upon appeal reversed and the cause remanded by this court. *State to use v. Rayburn*, 22 Mo. App. 303. At the November term, 1887, of the Butler county circuit court, it was again tried and a judgment again found for defendants, from which plaintiffs prosecute an appeal to this court.

There are numerous exceptions saved in the record in this case which contains over one hundred pages; nearly all the testimony having been objected to for one reason or another. The record, however, discloses one or two rulings of the trial court which are so manifestly erroneous that the judgment must be reversed and the cause remanded regardless of all the other questions presented by the record.

The defendant, sheriff Rayburn, had in the attachment proceedings levied upon certain books and accounts which he the next day released, and upon his writ of attachment made the following return:

"Executed the within writ in the county of Dunklin and state of Missouri, on the twenty-third day of

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August, 1881, by levying upon and seizing as the property of the defendants one ledger and a book of accounts; on the twenty-fifth day of August, A. D. 1881, released same, from fact that Oscar Kotizky, by his attorney setting a written claim to said property.

"(Signed) M. M. RAYBURN,
"Sheriff Dunklin County."

The attachment proceedings had been taken by change of venue from Dunklin to Stoddard circuit court in 1882, when plaintiffs obtained judgment for $1,535.32. This action on defendant Rayburn's bond was also begun in Dunklin county in November, 1882, and was taken by change of venue to Butler county, and was, of course, pending there from that time.

The bill of exceptions in this case contains the following:

"Defendants' counsel then offered in evidence a certified copy of the motion made in the circuit court of Dunklin county, asking leave of said court that said defendant Rayburn as sheriff of said county, should be permitted to amend his return on the writ of attachment in the case of Goddard, Peck & Co. *v.* Spiller, Haynes & McRee, which motion is in words and figures as follows, to-wit:

"Dunklin County Circuit Court: Monday, July 12th, 1886,—7th day of the Term. Present, Hon. John G. Wear, Judge, among others, the following proceedings were had:

"State *ex rel.*, Goddard, Peck & Co., *vs.* "M. M. Rayburn, *et al.*,	In Butler County Circuit on change of venue from Dunklin County, Missouri.

"Now comes the above-named defendants and move the court for leave to amend the sheriff's return to the writ of attachment in this court in the case wherein Goddard, Peck & Company were plaintiffs and Spiller, Haynes & McRee were defendants, in accordance with the facts, for the reason that said return is imperfect and

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fails to fully disclose clearly how said writ was executed, and all that was in fact done in the premises in the execution of said writ. S. M. CHAPMAN.
"Attorney for Defendants.

"State of Missouri, } ss.
"County of Dunklin. }

"I, W. G. Bragg, Jr., clerk of the circuit court within and for the county of Dunklin and state of Missouri, do hereby certify that the above and foregoing is a true copy of the original return of the sheriff of this writ of attachment in the case where Goddard, Peck & Company were plaintiffs and Spiller, Haynes & McRee were defendants, as fully as the same appears on file in my office.

"In witness whereof, I have hereunto signed my name and affixed my official seal at office in Kennett, this 22nd day of March, A. D., 1887.

"(L. S.) W. H. BRAGG, JR., Clerk."

This paper, or certified copy of a court record, if it showed anything at all, showed that at a day long subsequent to the time at which the Dunklin circuit court had lost jurisdiction of the case of Goddard, Peck & Company *vs.* M. M. Rayburn, by change of venue, and while the same was pending in Butler county, a motion was made in said Dunklin circuit court in said cause, which motion not only sets out the cause in which it is filed, but further states in terms that it is made in a cause which is then pending in Butler county circuit court by change of venue from Dunklin county circuit court. It will not do to say that this motion was something else; it is offered as a certified copy of a court record and speaks for itself and on its face declares not only that it is a motion in a certain cause, but states that the cause is pending by change of venue in another county, and is signed by counsel as "attorney for defendants."

There is no question but that the paper purported to be a true copy of certain proceedings in the case wherein trial was had in the Dunklin county circuit

court long after that court had lost jurisdiction of the cause, and neither appearance of parties nor consent could give any right to file any such motion or have it considered. Of course, we do not mean to say that M. M. Rayburn could not, by his attorney, file his application to be allowed to amend his return; we are not passing on that question now, but we do say that an application of Rayburn or any one else to be allowed to amend a return is one thing, and a motion, no matter for what purpose, in a case which is pending elsewhere is quite another.

By what rule of law or practice can a motion for any purpose be filed in a cause in a court which has long before transferred such cause by order changing the venue to another county? This paper should have been excluded when offered in evidence. The certificate of the clerk attached to it gives its only verity,—certifies "that the above and foregoing is a true copy of the original return of the sheriff of this writ of attachment," etc. As the paper certified to is not only not a return of the sheriff or any other officer, and does not even purport to be anything but a motion filed and signed by "S. M. Chapman, attorney for defendants," we do not conceive why its admission was permitted. The objection of plaintiffs to the admission of such testimony should have been sustained.

Following the above the defendants offered in evidence the following paper:

"State of Missouri *ex rel.* Goddard, Peck & Co. *vs.* "M. M. Rayburn *et al.*	Leave to amend sheriff's return.

"Now on this twelfth day of July, 1886, come the above-named plaintiffs and defendants, and it appearing to the court that plaintiffs have been duly notified of the making of the application of defendants heretofore filed in this court, praying for leave of court to amend the return of the sheriff to the service of the writ of attachment in the cause wherein Goddard, Peck &

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Company were plaintiffs and Spiller, Haynes & McRee were defendants, in accordance with the facts, and it appearing just and proper that such leave be granted; it is therefore considered, ordered, and adjudged by the court that leave be granted the said M. M. Rayburn to amend his return of the service of the said writ of attachment in accordance with the facts.

"State of Missouri, } ss.
"County of Dunklin, }

"I, W. G. Bragg, Jr., clerk of the circuit court within and for said county of Dunklin, do hereby certify that the above and foregoing is a true copy of the original order of court granting leave to amend the sheriff's return of service of the writ of attachment in the cause wherein Goddard, Peck & Company were plaintiffs and Spiller, Haynes & McRee were defendants, as fully as the same appears of record in my office.

"In testimony whereof, I have hereunto signed my name and affixed my official seal at office in Kennett, this 22nd day of March, 1887.

"[L. S.] W. G. BRAGG, JR., Clerk."

This shows that on the twelfth day of July, 1886, the circuit court of Dunklin county made an order in the case of Goddard, Peck & Company *vs.* M. M. Rayburn, which cause had been sent to the circuit court of Butler county nearly four years previous thereto. The order reads: "Now come above named plaintiffs and defendants," having first set out the style of the cause in which the court was about to make its order, and the order then recites carefully how defendants were brought into court.

If M. M. Rayburn desired to have a return amended in Dunklin county, there was a way in which to proceed, but he could not carry this cause back to Dunklin county for that purpose, nor could the circuit court there consider any motion made in the case. Defendants might as well have gone to any other county in the state and there filed a motion in the cause of Goddard,

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Peck & Company *vs.* M. M. Rayburn, *et al.*, asking some special relief, remedy, or order. The objections of plaintiffs to this testimony should have been sustained.

As this cause will have to be retried we desire to add that the court committed error in permitting defendants' counsel to read parts of certain depositions and omit other parts, and refusing to require the whole of said depositions to be read. This court has held that such action is reversible error. *Cook v. Harrington*, *ante*, p. 199.

The trial court also erred in not permitting to be read in evidence that part of the transcript in the case of Goddard, Peck & Company *vs.* Spiller, Haynes & McRee sent from Dunklin to Stoddard county. The transcript from Dunklin county, when filed in the circuit court of Stoddard county, became a record of that court, and a transcript of such record, if made out by the clerk and properly certified, is clearly entitled to as much credit as the transcript of any other pleading filed in the cause, and the objection made that it was the copy of a copy is not well taken. *Bettis v. Logan*, 2 Mo. 4.

We further suggest to the trial court that the deposition of Kochtitzky and the bill of sale thereto attached was competent evidence and should have been admitted.

J. H. McRee, one of the firm of Spiller, Haynes & McRee, testifies that the books were placed in his hands by the firm, and he was to collect enough on them to indemnify Oscar Kochtitzky and A. M. Shead, and to repay them whatever they should be compelled to pay Fisher Brothers & Company, of St. Louis, as endorsers of the firm of Spiller, Haynes & McRee, to said Fisher Brothers, to the extent of four thousand dollars, that is, they were endorsers on the firm's note to Fisher Brothers for four thousand dollars, and they were to be protected as above stated. Shead testified that he was a joint endorser on this four thousand dollar note to Fisher Brothers, with Kochtitzky, and that he paid two thousand dollars of it, and that the books were never at any

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time transferred to Kochtitzky that he knows of, for his benefit. The evidence would have shown, had the plaintiffs been permitted to introduce it, that the stock of goods of Spiller, Haynes & McRee was transferred to Kochtitzky and Spiller to protect Kochtitzky as endorser on this same four thousand dollar note, to Fisher Brothers, and that the goods thus transferred invoiced and were worth forty-two hundred dollars, and that Kochtitzky got this forty-two hundred dollars worth of goods to indemnify him on this endorsement, when he was bound for only one-half of it, two thousand dollars. This would certainly have shown that no transfer of the books had ever been made to Kochtitzky, or, if ever made, that it was fraudulent and without consideration, and was competent evidence; and for the same reasons the court erred in excluding from the jury as evidence all those parts of the depositions of Oscar Kochtitzky and A. M. Shead relating to the transfer of the stock of goods and the price at which they were transferred; and in the case of Oscar Kochtitzky's deposition, it was manifest error to exclude the parts of said deposition aforesaid in a general way, and on a general objection, by defendants, without having the parts objected to specially marked and designated, so that the jury could tell what had been excluded and what had not.

In the opinion which was formerly written in this case, there were some observations as to the court in which the amendment of the sheriff's return could be made, if at all. In making those observations, the court assumed that the record in the original attachment suit remained in the circuit court of Dunklin county, overlooking the fact that there had been a change of venue to Stoddard county. The court designed to express the view that the amendment to a sheriff's return can only be made in the court which has possession of the record and jurisdiction over the cause in which the return was originally made. That court, it appears, so far as relates to the attachment suit out of which this action

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has sprung, is the circuit court of Stoddard county, to which the attachment suit was removed by the change of venue from Dunklin county. To avoid any further mistake or misapprehension, we now state that the sheriff's return, if amendable at all, so as to affect the rights of the plaintiffs in the present action, can only be amended—not in this action, but in the original attachment suit and in the circuit court of Stoddard county.

The provision of the statute (Rev. Stat., sec. 3580), which allows such amendments in matters of form to be made "by the court to which such return shall be made," does not contemplate a case where the entire jurisdiction of such court has been vacated by a change of venue to another court, nor does it apply to such a case as this.

Amendments contemplable in section 3570, Revised Statutes, so far as it relates to returns, are amendments of returns of process in the particular suit which has resulted in the particular judgment.

As the purpose of such an amendment is to affect adversely the rights of the plaintiffs in this suit, who are also plaintiffs in the attachment suit, they should have reasonable notice of the application to make the same, and an opportunity to be heard in opposition thereto. It is scarcely necessary to add, in view of the observations of the Supreme Court in *Corby v. Burns*, 36 Mo. 194, that the circuit court of Stoddard county, in granting such an amendment, should proceed with great caution and should not grant it without clear and satisfactory proof. What the effect of the amendment, if made, will be, as an instrument of evidence upon a future trial of this cause, is a question which we do not wish to be understood as deciding now.

Instruction numbered eight, tendered by the plaintiffs, was properly refused because it submitted to the jury a question of law.

It follows from these conclusions that the judgment of the trial court must be reversed and cause remanded. It is so ordered. All concur. Rombauer, P. J., in the result.

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GEORGE W. KOONTZ, Respondent, v. LOUIS KAUFMAN *et al.*, Appellants.

Kansas City Court of Appeals, June 13, 1888.

1. PRACTICE—EVIDENCE—COMPETENCY OF RECORD OF JUDGMENT TO SHOW DAMAGES—CASE ADJUDGED.—Where the *gravamen* of plaintiff 's case is (as in this case) that, by reason of defendant's false and fraudulent representations respecting the ownership of property, he was induced to release the same from his levy (plaintiff being a constable at the time), whereby he was subjected to damages, it is competent to plead and put in evidence the record of that judgment, as his loss was consequent upon it, to prove the judgment, and its satisfaction. And being admissible for this purpose, it was proper not to exclude it on a general objection to its entire competency ; its effect should have been limited by instructions to the jury.

2. ——— RES JUDICATA--HOW FAR CONCLUSIVE, ETC.—It is a fundamental rule of the doctrine of *res judicata*, that judgments *in personam* conclude only parties to the record and their privies. They cannot be invoked by strangers. But among parties are those who have assumed such relation to the litigation as to be treated as a party. (But no one is a privy to a judgment whose succession to the rights of property thereby affected occurred previous to the institution of the suit). And where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation and opportunity to control and manage it. But merely appearing and testifying in the case is not sufficient to bind them, nor even the secret employment of counsel by them.

3. ACTIONS FOR FRAUD—QUALITY OF REPRESENTATION NECESSARY TO SUSTAIN—CASE ADJUDGED.—An action based upon the deceit or fraudulent representation of another cannot be maintained in the absence of proof that the party making them believed, or had good reason to believe, at the time he made them, that they were false ; or that he assumed that he had actual knowledge of their truth, though conscious that he had no such knowledge. There must be proof of the *scienter*. (That issue of fact was not properly submitted to the jury here, and there was no finding thereon).

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On motion for rehearing.

4. PRACTICE—APPELLATE COURTS—ASSIGNMENT OF ERRORS.—The statute directs the appellant or plaintiff in error to file in the cause a specific assignment of errors "on or before the first day on which causes from the same circuit are set for hearing, in default of which such assignment of errors, the appeal or writ of error may be dismissed," etc. The other party shall then join in such error within four days. (Rev. Stat., secs. 3764, 3765). The statute directs the court to examine the record, as presented here, on the assignments, and to affirm or reverse, as the fact and law may be. The inquiry is not limited to the points taken in the briefs of counsel.

5. ——— INSTRUCTION—RIGHTS OF PARTIES CONCERNING.—A party has a right to direct and positive instructions; and the jury are not to be left to believe in distinctions where none exist, or to reconcile positions by mere argument and inference. Such a practice would tend to mislead, instead of enlightening, the jury.

APPEAL from Cooper Circuit Court, HON. E. L. EDWARDS, Judge.

Reversed and remanded.

Motion for rehearing denied.

Statement of case by the court.

The petition in this case is as follows:

"The plaintiff states that on the twenty-fifth day of April, 1881, he was constable of Boonville township in the county of Cooper and state of Missouri, duly commissioned and qualified; that on the said day John L. O'Bryan commenced a suit by attachment before R. H. Howard, justice of the peace of said Boonville township, county and state aforesaid, against one Charles Kaufman, and a writ of attachment was issued by said justice in said cause and by him directed and delivered to plaintiff as constable as aforesaid to be by him executed according to law; that in obedience to the command in said writ plaintiff as constable as aforesaid on said day seized and levied upon the following described property as the property of said Charles Kaufman, the

defendant in said writ, that is to say, one two-horse wagon, one dark brown mule, one sorrel horse, one sausage-grinder, two meat blocks, two meat racks, one engine and boiler, one countershaft and pulleys and five hangers; plaintiff states that on the day next after such seizure and levy, to-wit, on the twenty-sixth day of April, 1881, the said defendants, Louis R. Kaufman and Frederick Kaufman, came to the plaintiff and stated and represented to him that they the said defendants were the owners absolutely of the property seized and levied upon as aforesaid by plaintiff as the property of said Charles Kaufman, that is to say, that part of said property belonged to one of said defendants and the remainder to the other, and that he the said Charles Kaufman had no right, title, or interest whatever therein; and the plaintiff says that, relying on the truth of the statements and representations so as aforesaid made to him by said defendants, that they were the owners of said property and that the said Charles Kaufman had no right, title, nor interest therein, plaintiff was induced to release and did release all of said property from such levy and on the same day delivered the possession thereof to said defendants.

"1. [Plaintiff states that afterwards, at the June term, 1881, of the circuit court of Cooper county the said John L. O'Bryan instituted a suit against plaintiff on his official bond as constable as aforesaid for a wrongful release of said property from the levy and seizure as aforesaid made by plaintiff, and at the February term, 1882, of said court recovered a judgment against plaintiff in said cause for the sum of $109.30; that said defendants had notice of the pendency of said suit and were present and testified at the trial thereof. Plaintiff says he sued out a writ of error in said cause and carried the same to the Supreme Court of the state of Missouri, where, at the October term, 1884, of said court, the judgment of the circuit court aforesaid was affirmed, and plaintiff has been compelled to pay off and discharge the same, amounting with interest and costs of suit to

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the sum of $225.77, and has also incurred great expense for attorneys' fees in and about his defence of said suit, to-wit, the sum of $115.00.]

"2. Plaintiff states that said defendants were not in fact the owners of the property seized and levied upon by plaintiff as constable as aforesaid, as they stated and represented themselves to plaintiff to be, and their statements and representations as aforesaid made to plaintiff, that they were the absolute owners of said property and that said Charles Kaufman had no right, title nor interest therein, were false and fraudulent and known to said defendants at the time so to be false and fraudulent; that said false and fraudulent statements were knowingly made by said defendants for the purpose of inducing plaintiff to release said property from said levy and seizure so made by him, and relying in the truth of said false and fraudulent statements, he was induced to release said property and deliver the possession of the same to said defendants. Wherefore plaintiff says a right of action has accrued to him, and that by means and in consequence of the false and fraudulent statements and representations so as aforesaid made to him by said defendants, he has been damaged in the sum of three hundred and fifty dollars, for which with interest and costs he asks judgment."

The defendants moved to strike out that portion of the petition included within brackets, on the ground, principally, that the proceedings and judgment therein named were *res inter alios acta*, and were not binding on these defendants. The court overruled the motion, and defendants excepted.

Defendants answered separately, tendering the general issue, and setting forth that they were the owners of separate portions of the property in question, describing the part each owned, and denied that their claim thereto was false and fraudulent.

Plaintiff's evidence tended to support the allegations of the petition, as to the seizure of the property under the writ of attachment, and that defendants came

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to him and made claim, each to certain portions of the property, and made the same in separate written claims; that they represented to plaintiff that they owned the same, as claimed, and that Charles Kaufman had no title to or interest in the same; that they also stated to him that he should not lose anything at the hands of O'Bryan if he should sue plaintiff for releasing said property; that upon the faith of their representations, as to the ownership of the property, he did release the same from the levy under the writ of attachment.

The plaintiff then, against the objections of defendants, read in evidence the record of the proceedings, judgments, etc., in the case of O'Bryan *vs.* Koontz, and the decision of the Supreme Court affirming the said judgment.

Plaintiff also made proof of the amount paid out by him in satisfaction of said judgment and costs both in the circuit and Supreme Court, and for attorneys' fees.

Plaintiff also introduced evidence tending to show that defendants had notice of the suit of O'Bryan against him, and that one of them gave him the names of certain witnesses, and that they attended as witnesses at said trial and testified in favor of Koontz. The plaintiff further testified that just after the trial in the circuit court had gone against him, he spoke to one of the defendants, and urged him to help him out of the judgment, when defendant answered: "You and O'Bryan will have to fight it out"; and defendants declined to do more.

Defendants' evidence tended to show that they did not make any joint representations to plaintiff touching their ownership of the property, but each for himself as to the part claimed by him, and that they made no other statements to him. They also testified that they in fact did own said property, as claimed by them, that they attended at said trial between O'Bryan and Koontz, on *subpoenae*, and testified as witnesses in behalf of Koontz.

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There were some facts and circumstances, developed in the cross-examination of defendants, from which the jury might reasonably infer, that as to a part of this property the title of defendants was only colorable, and that Charles Kaufman had such interest in one mule, and part of the machinery in the building, as to be subject to the writ of attachment.

The instructions given by the court on behalf of plaintiff, which bear upon the questions to be decided, are as follows:

"1. The jury are instructed that it is admitted by the pleadings in this case that the plaintiff, as constable of Boonville township, Cooper county, Missouri, on the twenty-fifth day of April, 1881, levied a writ of attachment in favor of John L. O'Bryan and against Charles Kaufman upon the property described in the petition; and if the jury believe from the evidence that afterwards, while the plaintiff held said property by virtue of said levy, the defendants herein, for the purpose of inducing the plaintiff to release said property, went to him and stated as a fact within their own knowledge that said property did not belong to the defendant in said attachment, but that part of it belonged to Louis Kaufman and another part to Fritz Kaufman, and that if the plaintiff should release said property he should lose nothing thereby; and that the plaintiff, relying upon the said representations as to the ownership of said property as true, was thereby induced to release said property from said levy; and that John L. O'Bryan, the plaintiff in said attachment, instituted suit against said Koontz for the wrongful release of said property on the ground that the same belonged to said Charles Kaufman, and that the defendants herein had notice of the pendency of said action against the plaintiff and gave him the names of persons to be summoned as witnesses therein and appeared and testified upon said trial, and that John L. O'Bryan in said action recovered a judgment against the plaintiff herein and plaintiff was compelled to pay said judgment, and if the jury believe

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that said representations of the defendants as to the ownership of said property were false, then the plaintiff is entitled to recover the amount he was compelled to pay to satisfy said judgment and costs and also the necessary expenses incurred by him in defending said suit.

"2. If the jury believe from the evidence that the defendants for the purpose of inducing the plaintiff to release the property levied upon by him represented and stated to him as a fact within their own knowledge, that the defendant in said attachment was not the owner of said property, and thereby induced the plaintiff to release said property from said levy, then it is wholly immaterial in this case whether said defendants believed said statements to be true or not; and if the jury further find from the evidence that they told the plaintiff that if he should be sued for acting upon their said representations he should lose nothing thereby, and that when O'Bryan sued plaintiff the defendants had notice of the pendency of said action and assisted in preparing the defence thereof, and that said O'Bryan recovered judgment in said action against the plaintiff and that the plaintiff was compelled to pay the same, and that the defendants' representations were false as to the ownership of said property, then the plaintiff is entitled to recover the amount he was compelled to pay to satisfy said judgment and costs, as well as the necessary expenses incurred by him in the defence of said suit."

The court refused the following instructions asked by defendants:

"2. Although the jury may believe from the evidence in this case that the property in controversy at the time of its seizure by Koontz under the writ of attachment, and at the time it was claimed by the defendants, belonged to Charles Kaufman, yet this fact will not authorize you to find your verdict for plaintiff unless you further find from all the evidence that the defendants wilfully, knowingly and falsely represented, and stated to Koontz that they owned said property."

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"5. If the jury believe from the evidence that the defendants each claimed a separate portion of the property levied upon by Koontz and that they separately notified the said Koontz in writing of their said claims and that he thereupon returned the same to them in accordance with their said demands, then you are instructed that a joint action cannot be maintained against them for so claiming said property, although their said claims to the ownership thereof were false; and you will, therefore, find your verdict for defendants, unless you further believe that they had previously agreed and conspired together to falsely and fraudulently claim said property."

"6. The court instructs the jury that in determining the ownership of the property mentioned in the petition you will not consider the verdict of the jury or the judgment of the court in the case of John L. O'Bryan *vs.* George W. Koontz."

The jury returned a verdict for plaintiff. From the judgment thereon entered the defendants have appealed.

COSGROVE & JOHNSTON, for the appellants.

I. The court erred in permitting the introduction in evidence of the pleadings and record in the suit of John L. O'Bryan *vs.* George W. Koontz *et al.* The defendants in the present case, Louis and Fred Kaufman, were neither parties nor privies to the former suit. *Henry v. Woods*, 77 Mo. 277; *Strauss v. Ayres*, 87 Mo. 348; *Quigley v. Bank*, 80 Mo. 289.

II. There is no evidence that the defendants were ever asked to take part in the defence of the suit of O'Bryan *vs.* Koontz *et al.*, any further than to testify as witnesses when subpœnaed, or that they ever had an opportunity of controlling or ever attempted to assume control of the defence of said cause and consequently they were not in privity with Koontz, nor "parties" to

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said suit. The facts in the cases of *Strong v. Ins. Co.*, 62 Mo. 289, and *Wood v. Ensel*, 63 Mo. 193, were very different from those in the present case. In the latter case the party sought to be bound by the former trial was an active participant therein, claimed the property in dispute, appeared as a witness, and in the absence of the defendant assumed control of the case and employed and paid attorneys to attend to it. No such facts appear in this case. The court erred in overruling the defendants' motion to strike out part of plaintiff's answer. See authorities above cited.

III. The court erred in refusing to submit to the jury the special issues requested by defendants. *Benton v. Railroad*, 25 Mo. App. 155.

IV. The court should have given instruction numbered six asked by the defendants, because they could not be held jointly liable in this action unless they had fraudulently agreed together to claim the attached property, and this question should have been submitted to the jury by instruction. Upon the theory of the circuit court the jury may have believed that one of the defendants was the owner of all the attached property claimed by him, yet it was bound to find a verdict against him for the whole amount of plaintiff's damages. This was attempted to be avoided by requesting the submission to the jury of the special issues, so that they might determine and report to the court the liability, if any, of each defendant.

V. The only reason for maintaining this action jointly against the defendants is upon the theory that they had fraudulently combined together to falsely claim all the attached property—without this element of combination suit could not be maintained against them jointly. Therefore, the jury should have been instructed to find a verdict for the defendants unless there was evidence of such false and fraudulent combination.

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DRAFFEN & WILLIAMS and T. B. WRIGHT, for the respondent.

I. We shall confine our brief to the points made by appellants. The court will not search the record for possible errors not complained of in appellants' brief, nor will it permit appellants, by a general assignment of errors, to require respondent to anticipate all possible rulings upon what had been made the subject of exception below. *McKenzie v. Railroad*, 24 Mo. App. 392.

II. The appellants' first point is not well taken. (*a*) The record in the case of O'Bryan *vs.* Koontz was certainly competent to prove the rendition of the judgment therein and the damages sustained by plaintiff. The plaintiff, in order to make out his case, was compelled to show that he had been mulcted in damages on account of defendants' fraudulent representations. To do this, it was necessary to introduce the judgment, and in order to show upon what it was founded, to present the pleadings. Its admissibility in evidence did not depend upon its conclusiveness in this case of the questions litigated in that. A judgment is evidence against all the world to prove its own rendition. It was also competent to prove the damages sustained. Freeman on Judgments [3 Ed.] secs. 416, 417. (*b*) If the record was admissible in evidence for any purpose, the first point made by appellants for a reversal cannot be sustained. *Schlicker v. Gordon*, 19 Mo. App. 479; *Babb v. Ellis*, 76 Mo. 459. (*c*) The record was not only competent as evidence, but was conclusive as to the questions litigated in that case. "An express notice to defendants to defend the suit was not necessary in order to charge their liability." *City v. Robbins*, 2 Black, 418; *Barney v. Dewey*, 13 Johns. 224; *Beers v. Pinney*, 12 Wend. 309; *Strong & Gantt v. Ins. Co.*, 62 Mo. 289. In the case first cited, it was said, "defendant knew that the case was in court; was told of the day of trial; was applied to to assist in procuring testimony; and wrote to a witness, and is as much chargeable with notice as if

he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity." (*d*) The matter sought to be stricken out of the petition was a necessary and proper averment. *Barney v. Dewey*, 13 Johns. 224. With that stricken out, the petition would not show how plaintiff had sustained any injury.

III. The court properly refused to submit to the jury for a special finding the questions asked to be submitted by defendants. "The statute only intends that issues in the cause shall be submitted to the jury for special finding, and not particular questions of fact." *Turner v. Railroad*, 23 Mo. App. 12. The issue in the case was, whether defendants falsely represented that the defendant in the attachment, Charles Kaufman, had no interest in the property levied upon therein. If they did so represent, and he owned any part of it (and the judgment in the case of O'Bryan *vs.* Koontz is conclusive, as shown above, that he did own it), then the courts will not stop to apportion the damages among wrongdoers. The questions were, therefore, immaterial. *Dutzi v. Geisel*, 23 Mo. App. 676. Even should it be held that the court ought to have submitted the questions asked by defendants, still this court will not reverse on that account, as the law authorizing such special findings has been repealed, and no good would result from a reversal of the judgment. Laws of Mo. 1887, p. 229; *Wayne Co. v. Railroad*, 66 Mo. 77; *Hubbard v. Gilpin*, 57 Mo. 441; *Totten v. James*, 55 Mo. 494.

IV. Defendants' fifth instruction was rightly refused. (*a*) The fact that each claimed in writing a separate portion of the property would not exempt either from liability for his fraudulent representations, that defendant in attachment had no interest in any of the property. (*b*) There was no allegation in the answers of a misjoinder. (*c*) It was unnecessary to prove that they had previously conspired together in the fraudulent claim, as it was shown that they went together to the constable. *Kenyon v. Woodruff*, 33

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Mich. 310; 2 Add. on Torts, sec. 1187; *McArthur v. Manufacturing Co.*, 12 Mo. 355; *Burgert v. Borchert*, 59 Mo. 80.

V. The defendants' representations as to the ownership of the property levied upon were clearly false, and their own evidence discloses the fact that the same were fraudulent, and were made to save the property from the attachment. The plaintiff, in good faith, acted upon these statements. He sustained damages in consequence, and, by the judgment below, the defendants are required to make good the loss sustained, and it is manifestly for the right party, and should be affirmed. *Kenyon v. Woodruff*, 33 Mich. 310; 2 Add. on Torts, p. 423, sec. 1187; *Barney v. Dewey*, 13 Johns. 224.

PHILIPS, P. J.—I. The first question, in order, for determination is, as to the admissibility in evidence of the record in the suit of O'Bryan *vs.* Koontz. The *gravamen* of plaintiff's complaint is, that by reason of defendants' false and fraudulent representations respecting the ownership of the property he was induced to release the same from his levy, whereby he was subjected to damage. As his loss was consequent upon that judgment, it was competent to plead and put in evidence that record to prove the judgment, and its satisfaction. Freeman on Judg. 416, 417; *Walker v. Deaver*, 79 Mo. 678; *Blasdale v. Babcock*, 1 Johns. 517. It being admissible for one purpose, it was proper not to exclude it on a general objection to its entire competency. The proper practice, where the evidence offered is competent for a certain purpose, but incompetent for others for which it might be misused before the jury, is to limit and qualify its proper application by instructions to the jury. *Babb v. Ellis*, 76 Mo. 460; *Schlicker v. Gordon*, 19 Mo. App. 479.

II. The further question arises, did the court err in giving or refusing instructions respecting the effect or office of said judgment? On the part of the defendants the court refused to direct the jury, that in determining

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the ownership of the property in question, they should not regard the verdict or judgment in O'Bryan *vs.* Koontz. This presented the question broadly as to whether said judgment was conclusive on the matter of such ownership. It was either an estoppel or it was not. If the judgment was not conclusive, as to this issue, it was no evidence at all. There was no half-way ground; and the defendants were entitled to have the jury properly advised as to the effect of this record admitted in evidence by the court over their objection. It is difficult to say from the first instruction given for plaintiff what effect was intended to be given to the judgment. It is submitted in connection with various other facts, leaving the jury to draw their own inference as to what importance they would attach to the recovery in O'Bryan *vs.* Koontz. They might or they might not have concluded that the judgment was conclusive on defendants as to the ownership of the property in question. And so we must hold to sustain this judgment.

It is a fundamental rule of the doctrine of *res judicata* that judgments *in personam* conclude only parties to the record and their privies. They cannot be invoked by strangers. Big. Estop. 59; *Quigley v. Bank*, 80 Mo. 290. These defendants were not parties of record in that action. Were they privies in contemplation of law? In its strict sense, privies are those who have mutual or successive relationship to the same rights of property, or subject-matter, such as "personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts." *Henry v. Woods*, 77 Mo. 281. As these defendants assert title and ownership anterior to the judgment, they are not bound as privies thereunder, in the ordinary sense; for "no one is a privy to a judgment whose succession to the rights of property thereby affected occurred previous to the institution of the suit." Freeman on Judg., sec. 162; *Henry v. Woods*, *supra*.

The doctrine as to parties has been extended so as to

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apply to a person, though not nominally a party to the record, yet who has *assumed* such relation to the litigation as to be treated as a party in interest, so as to be bound by the result. Illustrations of this exception are to be found in instances of a party employing attorneys to conduct the cause, furnishing witnesses, controlling and managing the suit at trial, and becoming responsible for costs, and the like. *Stoddard v. Thompson*, 31 Ia. 80; *Strong v. Ins. Co.*, 62 Mo. 289; *Wood v. Ensel*, 63 Mo. 193; *Landis v. Hamilton*, 77 Mo. 555. In *Strong v. Ins. Co.*, the rule was applied to the instance of a judgment against an original insurer, who contested the suit, with the advice or acquiescence, and for the benefit of, the reinsurer. The ruling was predicated of the principle that, "Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it." The principle was later applied by the Supreme Court in *Wood v. Ensel, supra.* In that case there had been a litigation and judgment between one Balke and Swift concerning the title of a billiard-table. In the present suit the defendant claimed that he was the mere bailee of said Balke; and the record of that judgment between Balke and Swift was admitted in evidence against plaintiff. The court said: "It was quite sufficient that the testimony of the plaintiff himself showed that he was an active participant in the former trial respecting the same subject-matter, claimed the property in dispute as his own, appeared as a witness in the case, and in the absence of Swift (who claimed to hold only as plaintiff's bailee) assumed control of the case, and employed and paid attorneys to defend and attend to it. These facts bring the plaintiff clearly within the definition of a party to the action he thus defends."

The facts of the case at bar fall far short of these requirements as to one who assumes to control the litigation. The evidence in this case only shows that one

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of the defendants gave Koontz, at his request, the names of two witnesses to call. The defendants appeared and testified for Koontz, under subpoena. The plaintiff himself testified: "I don't remember that they did anything at the trial but testify." They did not employ counsel in the case, nor assume to control and manage the case. Merely appearing and testifying in the case was not sufficient to bind them, nor even secretly employing counsel, had they done so. *Schroeder v. Larhman*, 26 Minn. 87; *Blackwood v. Brown*, 32 Mich. 107; *Wright v. Andrews*, 130 Mass. 149; Wells Res Adj., sec. 175.

The case of *Yorks v. Steele*, 50 Barb. 397, so often cited both by courts and text-writers, is a decided authority against the defendants being bound by said judgment, as to the ownership of the property, on the ground of their participation at the trial. One Pond obtained judgment against the plaintiff Yorks, and, under execution issued thereon, one Chase, as sheriff, levied on a horse in the possession of the defendant Steele as the property of Pond. Steele brought suit against Chase. On the trial of that issue, Yorks employed an attorney for the sheriff, and himself testified in the case. Steele recovered judgment, on the ground that the horse was not subject to the execution against Yorks. In the action then brought by Yorks against Steele to recover this horse, Steele was permitted to put in evidence the record of said judgment in Steele *vs.* Chase, and plaintiff took a nonsuit. The court held the judgment inadmissible. JOHNSON, J., said: "It is of no consequence, *prima facie*, that the plaintiff was a witness for the defendant in the action brought by this defendant. He had no right, as a witness, to examine or cross-examine other witnesses, or to call other witnesses, who might have a better knowledge of the facts than himself. In short, as a mere witness, he had no charge or control of the case whatever. And supposing that judgment was erroneous, for any reason, he had no right of appeal and no standing by which he

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could be heard to correct the error. Why, then, should he be bound by the adjudication? It was not a judgment against him, in any sense, nor upon any right or interest which would subject him to an action for recovery over, as in case of a failure of title upon the sale of chattels. * * * It is plain that the plaintiff has never yet had his day in court on the question of his title. There is nothing which proves, or tends to prove, that the present plaintiff defended, or had any right to defend, the former action. They were not in privity as master and servant, or principal and agent. The plaintiff here was under no obligation, moral or legal, to defend the sheriff in that action, and had no legal right to do so, or even to interfere with it in any way whatever. Not being a party to the record, he is not estopped by the judgment, unless, in the language of COMSTOCK, J., in *Castle v. Noyes*, 14 N. Y. 329, 332, he had a right to control the proceedings and appeal from the judgment." There is no pretense here that these defendants sought to control or manage the action of O'Bryan *vs.* Koontz. The plaintiff himself testified that immediately after that trial he asked one of the defendants to help him out, and the reply was: "You and O'Bryan will have to fight it out." Yet plaintiff appealed the case to the Supreme Court, where he was unsuccessful, making more costs, which he asserted in his testimony the right to recover from these defendants; and it is inferable, from the testimony and the amount of the judgment recovered herein, that he was allowed such costs by the jury. No exception, however, was taken to this evidence.

III. If, therefore, that judgment concluded the defendants on the question of ownership of the property, it must be on the only remaining rule, that, where a party is answerable over to another for the subject-matter of the judgment, he is bound by such judgment, when he has been notified of the pendency of the litigation, and had an opportunity to defend the action. This arises

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usually from some contractual relation between the parties, as in the case of the reinsurance in *Strong v. Ins. Co.*, *supra*, of indemnitors, warrantors, and the like. That is not this case. This action, under the petition, is *ex delicto*, predicated of the fraud, the wrong, and the falsehood of the defendants. It is in the nature of an action of deceit and fraud. And, although the plaintiff in his first instruction predicated a right of recovery on the fact, in part, that defendants told plaintiff if he released the property they would protect him, or some such representation, this was outside of the allegations of the petition, and should not have been given. *Benson v. Railroad*, 78 Mo. 504; *White v. Chaney*, 20 Mo. App. 390. If such assurance was affirmatively given by defendants, the plaintiff should have counted on the promise, and the doctrine of *respondeat superior*, invoked by plaintiff, would have then arisen on the contractual relation. But such is not this action. On this petition the plaintiff must prove the fraud, or the state of facts from which the fraud and deceit arise in law. *Arthur v. Man. Co.*, 12 Mo. App. 335.

It follows that if the judgment was binding on the defendants, it must rest upon the further rule, that the defendants are answerable over by operation of law, which is akin to the doctrine of *respondeat superior*. This has been applied to the instance of one who places obstructions, or commits some nuisance, in the streets of a town, whereby a person receives injury. The town being primarily liable to the injured party, if mulcted in damages at the suit of the sufferer, has a cause of action over against the wrong-doer whose immediate act caused the injury. In such case, if the municipal corporation when sued gives notice to the wrong-doer of the pendency of the suit, he will be bound by the verdict and judgment therein rendered, as to the fact that the highway was defective, that the person was injured, and the amount of the injury. Wells Res. Judicata, sec. 193; *Littleton v. Richardson*, 34 N. H. 187; *Chicago v. Robbins*, 2 Black, 418. This doctrine, or rule, has also

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been applied to the instance of an action arising, as in this case, *ex delicto*, for fraud and deceit, whereby the wrong-doer was answerable over to the party sustaining a loss by reason of such misrepresentation. This was notably so in the case of *Barney v. Dewy*, 13 Johns. 224, where the plaintiff was induced to buy a horse of the defendant on his fraudulent representations as to ownership. In an action of trover brought by the true owner against plaintiff the defendant appeared as a witness for the plaintiff and testified that the plaintiff owned the horse, and judgment went for the claimant. In the subsequent action for damages against the defendant instituted by the plaintiff, his vendee, the plaintiff introduced in evidence the record of that judgment. It was held to be admissible in evidence, and conclusive against the defendant. Our conclusion, therefore, is that the court did not err in refusing the sixth instruction asked by defendants.

IV. Appellants further contend that the court erred in refusing the fifth declaration of law asked by defendants. There is no question in my mind but that, in view of the defendants' evidence, they were entitled to an instruction to the effect that, if defendants only made separate claims to separate portions of the property, and separately represented to plaintiff that he claimed such portion, a joint action would not lie, without further proof of a prior combination between them thus to mislead and deceive the plaintiff. But the misfortune to defendants' contention is, that the instruction as framed did not clearly enough express such idea. It is: "If the jury believe, from the evidence, that the defendants each claimed a separate portion of the property, and that they separately notified Koontz in writing of their said claims." This could all be true, that each claimed a certain portion, and so notified Koontz, and yet the fact remain, as testified to by plaintiff, that they made these statements in each other's presence, that the other also owned the part he claimed. The

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instruction, as asked, ignored this aspect of the plaintiff's evidence, and told the jury that if each claimed a separate portion, without more, they should find for defendants unless they found the existence of the antecedent fraudulent combination or conspiracy. There may have been no prior fraudulent combination between the defendants to thus make claim to separate portions of the property, so as to cover the whole, yet, if in fact, when they were together in the plaintiff's presence, they falsely and fraudulently asserted that they were the owners of the property as each claimed it, and that the other owned the portion claimed by him, it was sufficient to base the joint action upon the falsehood, if the proof was such as to evince the fraudulent intent. The evil intent could arise at the instant. *Burgert v. Borchert*, 59 Mo. 83.

V. The court erred, however, in refusing the second instruction asked by defendants, and in giving the second instruction for plaintiff. As already stated the gist of this action is the fraud and deceit of defendants in claiming to own the property. The allegations of the petition are that said representations "were false and fraudulent, and known to said defendants at the time so to be false and fraudulent; that said false and fraudulent statements were knowingly made by said defendants, for the purpose of inducing plaintiff to release said property." These were essential averments, of facts constitutive of the cause of action, well known to the intelligent pleader, without which the petition would have invited a demurrer. The *gravamen* of the action is the false statement made with intent to mislead, followed by damage. *Medbury v. Watson*, 6 Met. 259; *Barney v. Dewey*, 13 Johns. 226; *Arthur v. Man. Co.*, 12 Mo. App. 335. "It seems to be established that an action based upon the deceit or fraudulent representations of another cannot be maintained in the absence of proof that the party making them believed or had good reason to believe at the time he made them that they were false, or that he assumed or intended to convey the impression that

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he had actual knowledge of their truth, though conscious that he had no such knowledge." *Dulaney v. Rogers*, 64 Mo. 203. There must be proof of the *scienter*. Were the law otherwise, it would be that any person who made claim to property seized on process, however honest and sincere he might be in the belief and conviction that he owned it, and however free from any design to defraud or wrong the other claimant, would be liable in this form of action where the officer released it on the faith of such asserted ownership. In short, it would make such claim *in pais* operate as an interpleader in the cause. It would make every judgment between the execution or attaching creditor and the officer, or other party concerned, *res adjudicata* against the party so presenting his claim to the officer, regardless of the question of being answerable over for the fraud in asserting the claim.

While the question as to Charles Kaufman's ownership of the property has been adjudicated, the other question, as to whether the representations and statements by defendants to Koontz were made in good faith or fraudulently, remains at issue, with the burden of proof on the plaintiff. That issue of fact was not properly submitted to the jury, and there has been no finding thereon. The case must, therefore, be retried.

The judgment is reversed and the cause remanded. Ellison, J., concurs; Hall, J., non-concurs.

On motion for rehearing.

Philips, P. J.—I. It is first suggested, in justification of this motion, that the judgment of reversal is placed upon grounds not distinctly made and relied upon by appellants in their brief; and, therefore, respondent's counsel did not cite the authorities now relied upon to show that the instructions criticised in the opinion have been substantially approved by the Supreme Court. The case of *McKenzie v. Railroad*, 24 Mo. App. 396, 397, is cited in support of the proposition

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that, unless the appellant shall point out in his brief the specific errors relied on for reversal, this court will not search through the record to discover the errors only designated in some vague or general way. As applied to the facts of that case, the observations of the learned judge who delivered the opinion were just and appropriate. The errors assigned were, that the trial court admitted or refused evidence that was competent, material, and relevant, or the reverse, without pointing out what particular evidence, thus leaving the court, without a guide, to grope and search through a record of three hundred and forty pages to make the discovery, and then without any assurance that the matter discovered was that relied on by the general suggestion.

The statute directs the appellant or plaintiff in error to file in the cause a specific assignment of errors "on or before the first day on which causes from the same circuit are set for hearing, in default of which such assignment of errors the appeal or writ of error may be dismissed," etc. The other party shall then join in such error within four days. Rev. Stat., secs. 3764, 3765. Where no such assignment of errors is made, the court will dismiss the writ, etc. 57 Mo. 602; 51 Mo. 412; 59 Mo. 143; 44 Mo. 604; 32 Mo. 230. This is to make an issue in this court. The statute directs us to examine the record, as presented here, on the assignments, and to affirm or reverse, as the fact and law may be. The brief of counsel is designed to aid the court in its investigation of the case. But we are by no means limited in our inquiry or conclusions to the points made or grounds taken in such brief.

In the assignment of errors in this case, the action of the lower court in giving and refusing instructions is distinctly alleged for error. Although counsel in their brief might urge one or more special criticisms and objections to the instructions, yet, if the court, in its examination, should discover other patent error or objection, it could not shut its eyes to the fact and the law,

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and, by passing it in silence, leave it as a precedent—as having received the tacit approval of the court. This, as experience and observation have taught us, is too frequently the case, to the misleading of attorneys and trial courts, and to the embarrassment of the appellate court when the matter again comes up for review.

If some instruction contains a verbal inaccuracy or hidden technical defect, to which the attention of the court was not called by appellant, and the court should affirm the judgment, the appellant ought not to be heard afterwards to complain. But where the error, as in this case, was patent, and acted on by the court, it can be no ground for a rehearing, at the motion of the respondent, that the appellant, in his brief and argument, laid no special stress on the error. This much we deem it important to say touching this practical matter of appellate practice.

II. It is conceded in the motion for rehearing, that fraud and deceit constitute the *gist* of this action; and that the burden of establishing the existence of the fraud rests upon the plaintiff. But it is contended that the instructions given on behalf of plaintiff met the requirements of the law, and gave the defendants as much as they were entitled to on this issue.

The gist of the action being, as all the courts agree, the *intent* to deceive, with consequent damage, it is a question of fact to be found by the jury. While the mode of proving this essential fact may vary with the attendant circumstances of each particular case, the central idea and principle remains fixed, that the element of fraud must be made to appear in some form or other. And while it is true, as asserted by the learned counsel, that it is not essential that actual falsehood should be uttered to give the right of action, it is as equally true that the mere utterance of a falsehood, or a fact, is not alone sufficient. The language of NAPTON, J., in *Dulaney v. Rogers*, 64 Mo. 203, 204, is, that the plaintiff must prove that the party making the false statements may have "believed, or had good reason to

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believe, at the time he made them, that they were false, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, *though conscious that he had no such knowledge*." Again he says, it must appear "that a representation is made which is *known* to be false."

So the instruction approved by the court contained the essential requirement. This is again distinctly brought out by NORTON, J., in *Kenny v. Railroad*, 80 Mo. 572, in which he says: "The generally received doctrine now is that, in order to support an action for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true and which were in fact false. There *must be fraud* as distinguished from mere mistake. It is not, however, always absolutely necessary that an actual falsehood should be uttered to render a party liable in an action for deceit; if he states material facts as of his own knowledge, and not as a mere matter of opinion, or a general assertion about a matter of which he has no knowledge whatever, this distinct wilful statement, *in ignorance of the truth*, is the same as the statement of a known falsehood, and will constitute a *scienter*." In this it is to be observed that the assertion of a fact as of his own knowledge is qualified with the words "in ignorance of the truth." This was necessarily so to make it harmonize with the holding of NAPTON, J., *supra*.

So in the later case of *Nauman v. Oberle*, 90 Mo. 669, the instruction approved was, that "if defendant falsely and fraudulently represented, etc., and *knew* the representation was not true."

Applying these rulings to the instructions under review, it will be found that while they were framed with some regard to the rule, yet they are so artfully (not in an invidious sense) drawn, as to not unreasonably warrant the jury in making the inference that if defendants stated that they owned the property, as of their own knowledge, and that statement turned out to be untrue, the *scienter* was proved without more. They do

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not contain the essential words, or the equivalent, "though conscious that they had no such knowledge," or that they were aware of the fact "that they did not know," or that it was "known to be false," and the like.

The fraudulent intent being the gist of the action, the defendants were entitled to have this issue of fact distinctly and sharply submitted to the jury, in such perspicuous language as to leave no just grounds for their minds being misled. As said in *Gray v. McDonald*, 28 Mo. App. 492, approving the language of STORY, J., in *Livingston v. Ins. Co.*, 7 Cranch, 544: "If in any point of law, the defendant was entitled to such direction, the court erred in its refusal, although the direction afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile positions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening the jury."

It is clear to our minds that the instructions, as drawn by plaintiff, were not calculated to convey as they should to the apprehension of the jury the real gist of this issue.

The motion for rehearing is denied. All concur.

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CHARLES T. WOOLFOLK, Appellant, v. M. P. KEMPER, Respondent. 31 421 / 42 82

Kansas City Court of Appeals, June 13, 1888.

1. PERSONAL PROPERTY—WHEN SUBJECT TO EXECUTION FOR PURCHASE PRICE—CONSTRUCTION OF SECTION 2353, REVISED STATUTES.—Under the provisions of section 2353, Revised Statutes, making personal property subject to execution on a judgment against the purchaser for the purchase price thereof, and excepting it from exemption from such judgment and execution, except in the hands of an innocent purchaser, etc., there is no direct lien created by the statute, though it may be considered, in some cases, as in the nature of a lien. The only mode provided by the statute for subjecting the property for the purchase price is to obtain a judgment therefor—though there might be relief in equity in a proper case.

2. ——— RELIEF IN EQUITY—PRINCIPLES GOVERNING IN, IN ORDER TO ENTITLE TO.—Before a court of equity will lend its aid, the party seeking it must have gone as far as he may with his legal remedy. After exhausting his legal remedies he could then ask the aid of a court of equity.

APPEAL from Johnson Circuit Court, HON. CHARLES W. SLOAN, Judge.

Affirmed.

The case is stated in the opinion.

SAMUEL P. SPARKS, for the appellant.

I. The plaintiff was given a legal remedy by statute to subject the property to sale for the purchase money. Rev. Stat., sec. 2345.

II. The death of Kemper and insolvency of his estate prevented a resort to a court of law. In such case equity will interfere when the remedy is inadequate at law. *Cass Co. v. Green*, 66 Mo. 478.

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III. In cases where it is doubtful whether courts of law can give relief, equity will retain jurisdiction. *West v. Wayne*, 3 Mo. 16; *Biddle v. Ramsey*, 52 Mo. 153.

IV. Insolvency is one of the peculiar heads of equity jurisdiction. *Freeman v. Freeman*, 9 Mo. 763.

V. Where a creditor obtains judgment against a party, and there is a return of *nulla bona*, such creditor may maintain an action in equity, to have a conveyance of personal property to his wife, set aside, to the end that the same may be sold on execution against the husband, and his bill made a case for equitable jurisdiction, not dependent on any statute. *Chardavoyne v. Galbreath*, South. Rep. 771. Equity will entertain jurisdiction on the want of a common-law remedy; for there may be such a remedy; it may be inadequate, for on the exercise of this jurisdiction often depends the exercise of a sound discretion in the court. *Brush Electric Co.*, 7 Atl. Rep. 774.

VI. It follows that, while there is no such thing as a lien at law in favor of a vendor of personal property, yet there exists an equity in his favor in such circumstances as was developed in this case, and the judgment should be reversed.

VII. This case is somewhat analogous to the case where a judgment is a lien against the interest of the husband in the lands of the wife, and the lands be sold in partition, the judgment will become an equitable lien on the husband's interest in the proceeds of the sale. *Ellsworth v. Cook*, 3 Paige Ch. 643; *Nuincewiez v. Cahn*, 3 Paige Ch. 614; *Flint v. Rawlings*, 20 La. Ann. 557. The above is a given instance showing that, while legally a creditor's right to his debt and the security therein may be changed by circumstances he cannot control, yet courts of equity will not leave him remediless. Overton on Liens, 31.

No brief for the respondent.

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ELLISON, J.—Plaintiff sold a brood mare to James W. Kemper for seventy-three dollars executing his note for sixty-five dollars of the purchase money. Some small payments were made and Kemper died leaving an estate of less than four hundred dollars, in value, when defendant, who is his widow, applied for an order from the probate court under section two, Revised Statutes, directing that no letters of administration be granted, as the estate did not exceed in value the sum allowed her, as the widow, by law. Such order was made and the property directed to be turned over to her, including the mare so sold to her deceased husband. Defendant claims the mare and refuses to pay the balance of the purchase price.

Plaintiff filed his bill in equity in the circuit court, setting up the foregoing facts and asking that he be declared to have a lien on the mare, and that it be enforced, and for other proper relief. A demurrer to the bill was interposed and sustained, and we think properly.

The section of the statute giving a vendor a right to hold personal property for the purchase price is as follows: "Sec. 2353: Personal property shall, in all cases, be subject to execution on a judgment against the purchaser for the purchase price thereof. And shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money." There is no direct lien created by this statute, though it may be considered in some cases, as in the nature of a lien. The only mode for subjecting the property for the purchase price is to obtain a judgment therefor. By this we do not mean to say that there is no relief in equity for a party in the condition plaintiff is, but we say that he has not yet placed himself in position to call into requisition the assistance of a chancery court. Under the very terms of the statute he should have a judgment in order to

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subject property to the purchase price; but aside from this, it is a principle of equity that before it will lend its aid, the party seeking it, must have gone as far as may be with his legal remedy. *Merry v. Fremon*, 44 Mo. 518; *Alnut v. Leeper*, 48 Mo. 319.

Although the widow has proceeded under section two, Revised Statutes, an order of the probate court, setting the property left by the deceased purchaser over to her and doing away with administration, yet this proceeding is not binding on this plaintiff and does not prevent him from going before the probate court and on a proper showing, as a creditor, have letters granted on the estate. This he should do, and then proceed to have his claim allowed. We are of the opinion that after having pursued this course, as his legal remedies will have been exhausted, so far as obtaining the benefit of said section is concerned, he could then ask the aid of a court of equity, by setting up the facts of his case as they would then be, to subject such property to the payment of the purchase price. This view of the case renders it unnecessary to discuss the authorities cited by appellant in his brief.

The judgment, with the concurrence of the other judges, is affirmed.

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IN THE MATTER OF THE ASSIGNMENT OF REDDING BROTHERS; W. W. RUCKER, Assignee, Respondent.

Kansas City Court of Appeals, June 13, 1888.

PRACTICE IN APPELLATE COURT—ABSTRACT OF RECORD—RULE FIFTEEN —CASE ADJUDGED.—Under rule fifteen of this court, the abstract of the record should set forth so much of the record as is necessary to a full understanding of the questions presented to this court for determination. The rule is imperative, because the abstract of the record is intended to take the place of the record, and must be, not a statement of what the record is, but an abridgment of the record. The appellants in this case have not filed such an abstract as is required by rule fifteen, and the appeal is dismissed, under rule eighteen of this court.

APPEAL from Chariton Circuit Court, HON. G. D. BURGESS, Judge.

Appeal dismissed for non-compliance with rule fifteen.

The case is sufficiently stated in the opinion of the court.

CRAWLEY & SON, for the respondent.

I. Respondent insists that under the rules and decisions of this court, the judgment of the circuit court should stand.

II. The pamphlet filed here by appellants presents no abstract of the record as required by rule fifteen. "Every part of the transcript relied upon as error, and all that is relied on to show it such, must be printed in the abstract." *Goodson v Railroad*, 23 Mo. App. 81; *Foster v. Trimble*, 18 Mo. App. 394; *Hansmann v. Hope*, 20 Mo. App. 193; *Coy v. Robinson*, 20 Mo. App. 462; *Hyatt v. Wolfe*, 22 Mo. App. 192.

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III. It does not appear from appellants' pamphlet, what judgment was rendered by the circuit court. The reasons urged in support of the motion for new trial below, are not given; and it does not appear that the circuit court so much as had a guess at any of the points raised in appellants' "brief." There being no assignment of errors, and nothing in the record as presented by appellants to warrant interference with the judgment below, it should, therefore, be affirmed. *McKenzie v. Railroad*, 24 Mo. App. 392; *Hansmann v. Hope*, 20 Mo. App. 193; *Coy v. Robinson*, 20 Mo. App. 462; *Wall v. Ryan*, 15 Mo. App. 575; *Sass v. Blackman*, 8 Mo. App. 565; *Cowen v. Shepley*, 8 Mo. App. 566; *Chappel v. Mulhall*, 7 Mo. App. 592; *Smith v. Babcock*, 3 Mo. App. 595; *Thompson v. Brown*, 595.

KINLEY & WALLACE, for the appellants.

We presume a correct "narrative" of the abstract and all the evidence in the case, introduced or agreed to, that bears on the matters involved, are all that is necessary to come within the rules of this court. We take it, the rules fixed by statute for the Supreme Court and the St. Louis Court of Appeals as to assignments of error, will be the rule of this court, as we have heretofore followed. See Rev. Stat., secs. 3784, 3785. The abstract of appellants shows that appealing creditors had their claims allowed by the assignee; shows the part of the report of the assignee to which there was objection, viz., the "fully" satisfying the Kellogg judgments, leaving only $606.75 to be distributed among the remaining creditors, which sum would pay only a small per cent. of their claims, which report was approved by the lower court. The exceptions are given in full, it is true, without attorneys' names printed, but, we take it, that is not material for this court to determine whether the exceptions should have been sustained or not, which exceptions were, by the court overruled, and the referee's report approved by the court—the approval complained of being approving the action of the

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assignee in paying the Kellogg judgments in full. The creditors filed "motion for rehearing thereon," says the abstract. Rehearing on what? The overruling of the exceptions upon the admitted, bald, undisputed facts; no more, no less. The judgment of the court complained of, was the judgment approving the assignee's report *in toto*, and not excepting the Kellogg payments. It is true we could have occupied twenty or more pages of closely-printed matter in giving the deed of assignment, the eight judgments, the eight executions, the referee's entire report, the notice given under the statute, and the entire list of claims allowed, which might have better pleased the gentlemen, who toy with an "umbilicus" with such abandon, but would encumbering the record with so much concerning which there is no controversy, have given the court a clearer understanding of what this controversy is, than the statement and abstract we have given? We have given all the evidence, all the contention, the exceptions, the motion for rehearing, which, of course, is for error in overruling the exceptions of appealing creditors, all of which is practically conceded by respondent's counsel as correct, as they furnish no abstract.

HALL, J.—This appeal is by certain of the assignor's creditors from the judgment of the circuit court overruling certain exceptions made by them to the report of the assignee and approving said report. The appellants' abstract of the record sets out the exceptions made to the assignee's report. The exceptions are as follows: "In the matter of the assignment of Redding Bros.

"Now come the attorneys of John V. Farwell, Tootle, Hanna & Company, and other creditors, and ask the court to correct the settlement of the assignee, herewith filed, and direct said assignee to distribute the money of said estate *pro rata* among the creditors, for the reason that he takes credit for the payment of one thousand and twenty-eight dollars to one Kellogg as a preferred creditor, when the deed of assignment does

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not make a preference and where there was no preference under the law."

As to the assignee's report the said abstract contains only the following statement:

"At the October term of the Chariton county circuit court the assignee presented his final exhibits in said estate, in which, after payment of all expenses, he showed that there had been left a balance of $1,634.65 in his hands, and of which he had applied enough to fully satisfy the said Kellogg judgments, which left only $606.75 to be distributed among the remaining creditors, which sum would pay only a small per cent. of their claims, which report was continued until the following April term to hear any exceptions that might be filed." The abstract of the record contains no part of the assignee's report itself.

The appellants' abstract of the record, under rule fifteen of this court, should have set forth so much of the record as was necessary to a full understanding of the question presented to us for determination. This rule is imperative and should have been obeyed. Under it the appellants were required to set forth in their abstract of the record that part of the report itself, *in haec verba*, to which their exceptions were made, so that we might see whether the report was open in fact to the objections made to it. The statement made by the appellants as to what the report was does not comply with the rule, because the abstract of the record is intended to take the place of the record, and must be, not a statement of what the record is, but an abridgment of the record. *Goodson v. Railroad*, 23 Mo. App. 81; *Foster v. Trimble*, 18 Mo. App. 394; *Hansmann v. Hope*, 20 Mo. App. 193; *Coy v. Robinson*, 20 Mo. App. 462; *Hyatt v. Wolfe*, 22 Mo. App. 192.

For this reason we must hold that the appellants have not filed an abstract of the record as required by rule fifteen, and in accordance with rule eighteen, imposing the penalty for a failure to comply with rule fifteen, the appeal must be dismissed. It is so ordered. All concur.

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TENNENT, WALKER & COMPANY, Appellants, v. GUENTHER & BLACKMAN, Respondents.

Kansas City Court of Appeals, June 18, 1888.

1. **PARTNERSHIP — EFFECT OF SALE OF INTEREST BY INDIVIDUAL PARTNER — NOT A SALE BY THE PARTNERSHIP.— Although the sale of his interest in a partnership by an individual member, dissolves the partnership, the purchaser acquires only the seller's interest in the residue after all the partnership debts and liabilities shall be discharged; and the partnership property is as completely as ever subject to the rights of the partnership creditors. The sale of the interest in such a case, is not a sale by the partnership.**

2. **——— ——— CHARACTER OF SUCH A SALE AS TO CREDITORS.—The mere fact of a sale of his interest in a partnership, by an individual member, is not fraudulent, nor is it any evidence of fraud.**

APPEAL from Morgan Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

The case is stated in the opinion.

A. W. ANTHONY, for the appellant.

I. It is hardly necessary to cite any authority in this case, as the fraud of Guenther & Blackman is clearly developed by the evidence. *Hagar v. Graves*, 25 Mo. App. 164, and cases cited; *Grocery Co. v. Cole*, 26 Mo. App. 5; *Bank v. Goldsoli*, 14 Mo. App. 586.

II. The trial court erred in taking the case from the jury. *Wilson v. Board*, 63 Mo. 137; *Brink v. Railroad*, 17 Mo. App. 177; *Fisher v. Railroad*, 23 Mo. App. 201; *Noeninger v. Vogt*, 88 Mo. 589; *Baum v. Fryrear*, 85 Mo. 151; *Groll v. Tower*, 85 Mo. 249; *Moody v. Deutsch*, 85 Mo. 237; *Walsh v. Morse*, 80 Mo. 568.

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III. I do not think it necessary to notice other exceptions during the trial, though well taken, especially as to the exhibit showing the sale of the farm.

WM. S. SHIRK, for the respondent.

I. There was no evidence which proved, or tended to prove, that the sales of the partnership, made first by Guenther, and afterwards by Blackman, were fraudulent, or made with a fraudulent intent to hinder and delay their creditors. The demurrer was correctly sustained so far as that portion of the evidence is concerned.

II. When Guenther sold his interest to McKean the firm of Guenther and Blackman stood dissolved. *Mudd v. Bast*, 34 Mo. 165.

III. The land, which he received for his interest became his individual property, and the creditors of Guenther and Blackman had no lien upon it. It did not become partnership property. *State ex rel. v. Thomas*, 7 Mo. App. 205.

IV. And the mere fact that Guenther conveyed this land to his father, or caused McKean to convey it, in payment of his individual debt, was not a fraudulent disposition of partnership property.

V. Guenther had a right to convey this property in payment of a *bona-fide* debt. *Knapp, Stout & Co. v. Joy*, 9 Mo. App. 47.

VI. No disposition which Guenther might make of this land, long after the dissolution of the partnership, could bind such former partnership, nor would it support an attachment against Blackman.

VII. A partner, although the firm may be embarrassed, has a right to sell out. And I do not think it worth while to argue the proposition, that if such retiring partner receive money or property for his interest, that any disposition he may make of it, cannot render the firm or firm property liable to attachment, on the sole ground that the partners have fraudulently disposed of their property, etc., so as to hinder and delay their creditors.

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HALL, J.—This was an action by attachment for goods sold and delivered by the plaintiffs to the defendants, doing business as partners. One ground alleged for the writ of attachment was, that the defendants had fraudulently conveyed and assigned their property so as to hinder and delay their creditors A plea in abatement was filed by the defendants, on a trial of which they had judgment, from which the plaintiffs have appealed to this court.

The record in this case is very unsatisfactory. It does not appear what property was attached, and the evidence is not as full as it should be. But from the evidence offered by the plaintiffs and refused by the court, and that introduced by the plaintiffs, it appears that the defendant partnership owed, at the time hereinafter mentioned, the sum of thirty-five hundred dollars; that, on or about November 24, 1884, Guenther sold his interest in the partnership property to one McKean for twenty-nine hundred dollars, receiving certain real estate at twenty-two hundred dollars and the balance in money and notes, the real estate being conveyed directly to Guenther's father in payment of an individual debt which Guenther owed him; and that, in the latter part of December, 1884, Blackman sold his interest in the partnership property to said McKean for two thousand, or twenty-two hundred dollars, all cash.

On such evidence the court instructed the jury to return a verdict for the defendants.

The sale of Guenther was not a sale by the partnership. Proof of such sale did not sustain the allegation that the defendants had conveyed their property. The sale by Guenther of his interest in the partnership property dissolved the partnership. Story on Part., secs. 3072, 3078; *Spanhort v. Link*, 46 Mo. 199. McKean acquired only the interest that Guenther had in the partnership property, viz., one-half of the residue after all the partnership debts and liabilities should be discharged. 2 Lind. on Part. 698. The property of the

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partnership was as completely as ever subject to the rights of the partnership creditors. The dissolution of the partnership in no wise affected those rights. Though dissolved, the partnership continued to exist for the purpose of collecting the assets, paying the debts, and winding up the concern. Story on Part., secs. 324, 325; *Mudd v. Bast*, 34 Mo. 468.

Since Guenther sold nothing but his interest in the partnership property, what he received in consideration of the sale by him was his individual property, and in no sense belonged to the partnership. Therefore, Guenther had the right to transfer such consideration in whole or in part to his individual creditor.

We thus find that, under the evidence, not only did Guenther convey simply his individual property, but also that the conveyance by him was not fraudulent. No ground has been suggested by counsel for the plaintiffs, and none has occurred to us, on which the sale by Blackman of his interest in the partnership property can be held to be fraudulent. As to the sale by him the evidence merely shows the sale, nothing more. Under the evidence we cannot see on what ground the sale can be held to be fraudulent. The evidence does not show that neither Guenther nor Blackman was amply responsible for all the partnership debts.

We think that the judgment should be affirmed. It is so ordered. All concur.

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CITY OF KANSAS, Appellant, v. L. F. MCALEER, Respondent.

Kansas City Court of Appeals, June 18, 1888.

1. **CHARTER OF KANSAS CITY—PROVISIONS OF AS TO NUISANCES.—The City of Kansas not only has the power to abate nuisances, but by its charter has the extraordinary power to define and declare what is a nuisance, which is broader than the general authority to abate. But neither will justify a wanton declaration that an act or avocation is a nuisance which unquestionably is not; or an unwarrantable invasion of private rights.**

2. **—— OWNERSHIP IN PROPERTY SUBJECT TO RESTRICTIONS—CASE ADJUDGED.—Every right, from an absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. As a city extends, offensive trades must be removed to vacant grounds beyond the immediate neighborhood of the residences of citizens. Nor will it avail to show that the objectionable machine used in this case was of the most modern kind, and as complete as possible of its kind.**

APPEAL from Jackson Criminal Court, HON. HENRY P. WHITE, Judge.

Reversed and remanded.

The case is stated in the opinion.

R. W. QUARLES and W. A. ALDERSON, for the appellant.

I. The running of a rock-crushing machine, at the place charged in the information, constituted a nuisance; and the ordinance under which defendant was prosecuted—the violation of which he admitted—is valid. Charter Kansas City, art. 3, sec. 1, subdivs. 5, 33; Acts 1879, pp. 204, 207; *St. Louis v. Frein*, 9 Mo. App. 590; *Leete v. Pilgrim Society*, 14 Mo. App. 590; *St. Louis v. Stern*, 3 Mo. App. 48; *State ex rel. v. Beattie*, 16 Mo. App.

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131; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; *Coker v. Birge*, 9 Ga. 425; *Narrows v. Thomas*, 51 Me. 563; *Inhabitants v. Mayo*, 109 Mass. 315; *Grady v. Widner*, 46 Ala. 381; *McKeon v. Lee*, 51 N. Y. 308; *In re Lead Co.*, 96 Pa. St. 116; s. c., 42 Am. Rep. 534, and note; *Dittman v. Repp*, 50 Md. 518; s. c., 33 Am. Rep. 325; *Emory v. Powder Co.*, 22 S. C. 476; s. c., 53 Am. Rep. 730; *Hutchinson v. Smith*, 63 Barb. 251; *Ross v. Butler*, 19 N. J. Eq. 294; Wood's Law of Nuis. [2 Ed.] secs. 1, 495, 504, 505, 506, 507, 508, 509, 513, 543, 545, 743, 744, and 745; Tied. Lim. Pol. Pow., secs. 1, 122*c*, 104; *Railroad v. Husen*, 95 U. S. 465; *Butchers' Co. v. Crescent City Co.*, 111 U. S. 746; *Barlier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; Dill. Mun. Corp. [3 Ed.] secs. 379, 396, 407; Horr and Demis' Mun. Pol. Ords., secs. 250, 255.

II. It does not avail the defendant anything that he had placed his rock-crusher at the place charged in the information and was operating it there before the ordinance was in force. *State ex rel. v. Board of Health*, 16 Mo. App. 8; *Hayden v. Tucker*, 37 Mo. 214; *Harmon v. Chicago*, 110 Ill. 400; s. c., 51 Am. Rep. 698; *Railroad v. Lake View*, 105 Ill. 207; *Commonwealth v. Fenton*, 139 Mass. 195; *Campbell v. Seaman*, 63 N. Y. 568, 584; *Baker v. Boston*, 12 Pick. 184, 193; *Coates v. Mayor*, 7 Cow. 585, 603; *Fertilizing Co. v. Hyde Park*, 97 U. S. 656; *Weir's Appeal*, 74 Pa. St. 230; *Slaughter House Cases*, 16 Wall. 36, *Taylor v. The People*, 6 Park. Cr. Rep. 347, 352.

III. It is no answer to the charge in the information, that "the defendant", to quote from the special finding of facts by the trial court, "in preparing his machine has made use of the most modern, improved, and approved appliances, thereby reducing its offensiveness and the annoying character of the machine to the minimum." Wood's Law of Nuis. [2 Ed.] sec. 552, and cases cited; *State v. Ball*, 59 Mo. 321; *Pennoyer v. Allen*, 14 N. W. Rep. 609; *Cooper v. Randall*, 53 Ill. 24.

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No brief for the respondent.

ELLISON, J.—Defendant was convicted before the city recorder of Kansas City on an information in which it was charged that he, "within the corporate limits of the said City of Kansas, and in and upon a block wherein there were at said times three residences or dwellings occupied, did then and there unlawfully cause, allow, commit and maintain a nuisance by running and operating a rock-crushing machine." The section of the ordinance which the defendant was charged with violating, is as follows: "Section 1: The running or operating of a rock-crushing machine in any block or square wherein there are three or more residences or dwellings occupied, is declared to be a nuisance, and is by this ordinance prohibited."

That portion of the charter on which this ordinance is founded is as follows:

"The common council * * * shall have power within the jurisdiction of the city, by ordinance:

* * * * * * * * * *

"Fifth. To make regulations to secure the general health of the inhabitants, to prevent, abate and remove nuisances within the city and within one mile thereof, and to punish the authors thereof, by penalties, fine and imprisonment; to define what shall be deemed nuisances, and to direct the summary abatement thereof. * * *"

The defendant appealed to the criminal court of Jackson county, where he contended that the ordinance under which the complaint was drawn is invalid. The criminal court, a jury having been waived, sustained such contention and discharged the defendant, from which judgment of the court, the City of Kansas appealed.

Defendant admitted at the outset, "that he ran a rock-crushing machine in the block at the times charged in the information where there were at such times, three

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occupied dwelling-houses." This was tantamount to a plea of guilty, unless defendant intended to supplement the admission by showing the ordinance to be wholly unreasonable and oppressive. The city, however, assumed the burden of showing the act to be a nuisance in fact, without reference to the municipal declaration to that effect. This was an unnecessary burden.

I. A nuisance is defined by Blackstone to be "anything that worketh hurt, inconvenience or damage." One of the chief functions of the police power is to regulate and abate nuisances. This power, though inherent in every state, is not easily defined; though circumscribed, it is nearly impossible to say, by what specific line. It belongs primarily to the state, but may be, and is, in this country, in large part, delegated to municipalities. Its exercise extends to the entire property and business interests within their jurisdictions. And it is in respect to nuisances that this power, if properly applied, does the most good, but if improperly, will work the greatest harm. The City of Kansas not only has the power to abate nuisances, but by its charter, has the extraordinary power to define and declare what is a nuisance; this is broader than general authority to abate. But neither will justify a wanton declaration that an act or avocation is a nuisance which *unquestionably* is not. "Much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with unless they are manifestly unreasonable and oppressive, or unwarrantably invade private rights, or clearly transcend the po wers granted to them.' 1 Dillon Mun. Corp., sec. 379. Whether such ordinance is unreasonable and, therefore, invalid, is a question for the court and not a jury, *Ib.*, sec. 327. In determining whether it be reasonable, the court should not substitute its discretion for that of the municipal legislation. The power of the court in this respect, should not be hastily or incautiously exercised. *Fisher v. Harnsberg*, 2 Grant (Pa.) 291; *Commonwealth v. Robertson*, 5 Cush. 438; *City of St. Louis v. Weber*, 44 Mo·

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547. "In doubtful cases, where a thing may, or may not, be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering (to declare and define what shall be a nuisance), their action, under such circumstances, would be conclusive of the question." *Railroad v. Lake View*, 105 Ill. 207. The case should have been considered in accordance with this view of the law and if so considered, there is nothing in the evidence justifying the court in declaring the ordinance invalid.

II. That the machine was in operation at the place charged, before the passage of the ordinance, is of no avail as a defence. *Hayden v. Tucker*, 37 Mo. 214; *Campbell v. Seaman*, 63 N. Y. 568; *Wells' appeal*, 74 Pa. St. 230; *Coates v. Mayor*, 7 Cowen, 585. In the case last cited, the charter of New York City gave authority to pass by-laws to prevent the interring of dead bodies within the city. In 1813 the common council passed an ordinance forbidding, under penalty of two hundred and fifty dollars, any person from burying dead, within certain limits, which included Old Trinity Churchyard. After the passage of this ordinance, defendant Coates buried a body in such yard and was prosecuted for the penalty prescribed by the ordinance. His plea was that the place where the interment took place was a part of a close called, Trinity Churchyard, situate in the first ward of the City of New York, which was patented by William III., King of Great Britain, in 1697, and whereby divers persons were constituted a body corporate by the name of "The Rector and Inhabitants of the City of New York, in communion of the Protestant Episcopal Church of England;" that such letters patent confirmed the churchyard to the corporation and to its successors forever, as and for a cemetery, with the rights, customs, fees, perquisites, profits, etc., as the same were then in the possession of the corporation;

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that immediately after the grant, the land was appropriated as a burying-place for the interment of dead bodies at and for certain fees, perquisites, and profits then and there charged and received; that defendant was a sexton of Trinity Church, and as such, had charge of the ground, and by the leave and license of said corporation, buried the dead body. This plea was held bad, though it set up a legal use and profit of the property for more than a century before the ordinance was passed. The court held that it made no difference that the right was purchased previous to the passage of the by-law. That every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity and that it must yield to by-laws for the suppression of nuisances.

And so it was said in *Weir's appeal*, *supra*, that "carrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not entitle the owner to continue in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and travellers upon which, it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds, beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand."

III. It follows from what has been said in reference to the right of the corporation to declare and define what shall be deemed a nuisance, that the fact that defendant in preparing his machine made use of the most modern appliances and thereby reduced its offensiveness and annoying character to the minimum is no defence to the charge. *State v. Ball*, 59 Mo. 321. The defendant is not charged with not operating his machine

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in the best manner he could and in the most approved way, but the complaint is in operating it in a forbidden place.

The result is, that we will reverse the judgment of the criminal court and remand the cause with directions to proceed in accordance with this opinion. All concur.

JOHN J. RILEY, Respondent, v. THE CITY OF KANSAS, Appellant.

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Kansas City Court of Appeals, June 18, 1888.

1. POLICEMEN—ACTION AGAINST CITY FOR SERVICES — SANFORD V. KANSAS CITY REAFFIRMED.—It was expressly held in *Sanford v. City of Kansas*, 69 Mo. 466, that a policeman could not, without first obtaining from the board of police commissioners a warrant therefor on the city treasury, maintain an action against the city for his services. His remedy in such a case is by *mandamus* to the board of police commissioners to compel the issuance of the proper warrant.

2. KANSAS CITY—BOARD OF POLICE COMMISSIONERS FOR — WHO INVESTED WITH POWER OF REGULATING COMPENSATION OF POLICE OFFICERS.—Under the act of the legislature (Laws of Mo. 1874, p. 327) creating the board of police commissioners for Kansas City, the board, and not the city council, was invested with the power and duty of fixing and regulating the compensation of police officers. The act gives the board the exclusive control of the members of the police force. (*Flanagan v. City of Kansas*, 69 Mo. 462.)

3. ——— REMEDY OF POLICEMAN AS AGAINST BOARD — CASE ADJUDGED.—If the board of police commissioners (as is alleged here) wrongfully dismissed the plaintiff from his office, without cause and trial, he had a clear remedy by *mandamus* to compel his reinstatement. (High on Ex. Rem., secs. 67, 69.)

APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Reversed and petition dismissed.

The case is stated in the opinion.

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R. W. Quarles and W. A. Alderson, for the appellant.

The Supreme Court has directly decided that an action of this nature cannot be maintained against the City of Kansas. The act establishing the board of police commissioners and the amendment thereto are alone sufficient to emphatically negative the city's liability to the appellee, his suit not being on a warrant drawn on the city by the board. Argument to any extent would be superfluous. The three assignments of errors may be reduced to the single proposition that this action cannot be maintained, and the judgment should be reversed and the cause dismissed. *Flanagan v. City of Kansas*, 69 Mo. 462; *Sanford v. City of Kansas*, 69 Mo. 466; Acts of 1874, p. 327; Acts of 1875, p. 193.

Chase & Powell, for the respondent.

I. While no such position was taken in the court below, it appears from cases cited in appellant's brief (69 Mo. 466) that defendant now claims that plaintiff's proper remedy was a writ of *mandamus* to compel police commissioners to issue warrants for amount due plaintiff, and then a suit against the city upon such warrants. If such be plaintiff's proper course, for how much should the warrants have been ordered on the first count of plaintiff's petition, which is for a breach of the contract of hiring? Is the court first to hear evidence as to the liability of the city to plaintiff, and the amount of such liability, and then by its writ of *mandamus* command the board of police commissioners to issue the warrants for such amount in favor of plaintiff, as the basis of his action against the city? We find neither law nor precedent for such legal absurdity, and if such course be unreasonable and absurd, how can it be said that the issuance of warrants must first be commanded before the city is liable for payment of services rendered by its police officers? And especially

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when the fourteenth section of the act creating a board of police commissioners (*Sanford v. The City of Kansas*, 69 Mo. 467) "provides two modes whereby the members of the police force are to be paid: First, the board is to make requisition upon the disbursing officer of the city for the requisite sum; second, in case the common council fail to make the requisite appropriation, or the disbursing officer fail to pay, then it becomes the duty of the board to issue warrants in the name of the City of Kansas for the requisite amount.

II. Defendant very nearly takes the position that if the agent of a principal refuses to pay out money put in his hands for a specific purpose, and recognized indebtedness, that his principal is thereby released from liability for such services. This proposition seems to be without authority or precedent, unless the case by appellant cited, in 69 Mo. 466, may be called a precedent, and against this we protest, as we are unable to apply the law of that case to the opposite state of facts here existing. We think it doing violence to the opinion in said case rendered, to draw an inference even that the "two modes whereby the members of the police force are to be paid" were to be invoked at the same time, and for the same purpose, or that warrants, as provided in the second "mode," should be issued in payment of policemen's claims for services, when the money therefor had already been appropriated and placed in the hands of board of commissioners for payment of same claims for which warrants would issue, if issued at all; or, when the first mode had been adopted. Why, the warrants are but the written obligation of the city to pay. And the act nowhere contemplates that the city must give her note in payment for policemen's services, "bearing interest at six per cent. per annum, payable on demand," when the city has the money on hand and drawing no interest, for the payment of such services. We neither understand said opinion (*Sanford v. City of Kansas*, 69 Mo. 466) to support the position of defendant, that city is not proper party defendant, nor to hold the doctrine

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that "*mandamus* against board of police commissioners," commanding them to issue warrants, is plaintiff's appropriate remedy, when the first mode of paying has been adopted and money is in hands of party legally authorized to pay.

III. This seems to us a delegation of agency. Their services are performed for and on behalf of the city. They have express power to bind the city in the line of their services. And they are paid by the city for such services. *Barnes v. Dist. Columbia*, 1 Otto [U. S.] 540; *Devoy v. Mayor*, 39 Barb. [N. Y.] 169; *People v. Mayor*, 25 Wend. [N. Y.] 680; *Green v. Mayor*, 2 Hilton [N. Y.] 203.

IV. In *Green v. Mayor*, 2 Hilton [N. Y.] 203, the court say the defendant's liability is fixed by competent authority, and defendant is subject to the ordinary modes of having legal liabilities enforced. Citing, also, 25 Wend. 680, above cited. In the case at bar, defendant's liability is fixed by statute, "competent authority," and, as warrants are only required to be drawn for pay of policemen, in case the city refuses to make an appropriation, or the disbursing officer fails to pay over the same to the board, we see no reason why defendant is not "subject to ordinary modes of having legal liability enforced." And this is not by *mandamus* for warrants, in cases where no warrants are required, but by the mode herein invoked. In what cases courts may issue writs of *mandamus* and other remedial writs, has not been prescribed in the constitution authorizing such writs, nor in our written law, otherwise than by the adoption of the common law, which defines the class of cases to which they are respectively applicable. *Dunklin County v. District County Court*, 23 Mo. 449; *State ex rel. v. Lafayette County Court*, 41 Mo. 225.

V. And again, *mandamus* will not lie where the amount is in dispute. *The People ex rel. v. Hawkins*, 46 N. Y. App. 11; *The United States ex rel. v. Edmunds, Commissioner*, 5 Wall. 563; *People ex rel. v. Leonard*, 74 N. Y. App. 443.

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VI. Plaintiff herein sues for breach of contract of hiring, and also for services rendered. Two questions, therefore, are here in dispute: First, is plaintiff entitled to anything? Second, if so, how much? We recur, then, to the only question before the court in this case: Can a policeman maintain an action against the City of Kansas for a breach of contract of hiring, or for services rendered said city as a police officer? Authorities above cited expressly hold that such action cannot be brought against the board of commissioners. Then, if not against the city, is a police officer without remedy?

PHILIPS, P. J.—The petition contains two counts. The first alleged that the plaintiff, in 1883, was appointed and employed by the board of police commissioners for the defendant city, as a policeman for the period of three years, at the stipulated sum of $72.50 per month; that he entered upon such service and so continued until the nineteenth day of May, 1885, when he was, without cause or trial, unlawfully discharged from his office and employment by said commissioners, and wrongfully deprived of the benefit of such compensation for the residue of the term of his appointment; wherefore he asked judgment, etc. The second count was *indebitatus assumpsit*, for three months' service rendered defendant by plaintiff as policeman.

The answer, after tendering the general issue, as to matters not admitted, pleaded that the authority and responsibility for such appointments and dismissals belonged exclusively to the board of police commissioners, and that the defendant was not liable therefor in a direct action. Judgment for plaintiff on both counts; from which defendant has appealed.

I. The single question presented by this appeal is, whether or not the defendant city is liable in this form of action for the imputed acts and defaults of the board of police commissioners? As to the second count, which as shown by the proofs was for nineteen days' pay due plaintiff at the time of his discharge, we are of

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opinion it is not maintainable. It was expressly held in *Sanford v. City of Kansas*, 69 Mo. 466, that a policeman could not, without first obtaining from the board of police commissioners a warrant therefor on the city treasury, maintain an action against the city for his services. His remedy in such case is by *mandamus* to the board of police commissioners to compel the issuance of the proper warrant. We are bound by that decision.

II. While the precise question involved in the first count has not been passed upon by the Supreme Court, we are of opinion that the principle involved is covered by said decision and that of *Flanagan v. City of Kansas*, 69 Mo. 462. In the last-named case it was held, that under the act of the legislature (Sess. Acts 1874, p. 327) creating the board of police commissioners for Kansas City, the board, and not the city council, was invested with the power and duty of fixing and regulating the compensation of police officers. SHERWOOD, C. J., who delivered both opinions, said: "We are satisfied, upon examination, that the act establishing the board of police commissioners gave that board the exclusive control of the members of the police force." In the *Sanford case* he held the following language: "To the board of police commissioners belonged the exclusive control of all matters pertaining to the employment, pay, and regulation of the police force of the city. * * * As the law organizing the police board has confided to their special care the matters pertaining to the pay of policemen, and specified a particular way for them to be paid, we incline to the opinion that the method thus pointed out should be pursued; for the latter clause of section fourteen prohibits in unmistakable terms the mayor and council to appropriate and disburse money for the payment of the police force, except as they are in that section authorized. We do not think it was the design of the legislature, after making such explicit provisions for the employment and payment of the police force, that those provisions should be wholly disregarded, and the city

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subjected to the annoyance and costs of suits as numerous as the policemen who choose to bring them."

It is clearly manifest, to my mind, from the whole tenor and scope of the act creating the board of police commissioners, that it was the design of the legislature to make the board entirely independent, in their administrative capacity, of the control, interference, or authority of the city government. The familiar history of the popular demand, respecting the administration of police government in our metropolitan cities, leaves little room for doubt as to the intent and policy of the legislative scheme. The commissioners owe not their appointment to the city. They derive none of their powers from its charter. They receive their appointment and commission from the Governor of the state; and are essentially officers of the state. Their powers and duties are all derived from and defined by the legislative act. These municipal communities are such important integral parts of the state as to make the administration of the police law among the local constituency of vast public importance; well justifying its commission to its own appointed board, wholly independent of the municipal authorities or responsibility.

The first section of the act, while recognizing the right of the city to make its own ordinances for the preservation of police order, expressly restrains the mayor and common council to such ordinances as shall in "no manner conflict or interfere with the powers or the exercise of the powers of the board of police commissioners."

The second section repeals and nullifies all the provisions of the city charter or any of its ordinances, which "authorize the common council, the mayor and marshal, to appoint, pay and regulate the police of said city."

Section six gives the sole power of appointment, management and dismissal, of the police force to the police commissioners.

Section ten gives power to the said board "to make

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and enforce all rules and regulations, not inconsistent with this act, as they may deem necessary for the appointment, employment, uniforming, discipline, trial and government of the police," etc. And by section thirteen, it is declared that, after the passage of said act, and the first meeting of said board, "the whole of the existing police force in the City of Kansas, both officers and men, shall pass under the exclusive control and management of the said board, and be subject to no other control, and entitled to receive neither orders *nor pay*, except arrearages then due, from any other authority." And, as if to leave no possible doubt as to what was intended, and to emphasize the complete divorcement of the police board from the city authorities, the section concludes with an absolute negation of the right or power of the mayor or common council, to appoint or dismiss, or in any manner employ or control the police force organized by the commissioners.

The fourteenth section then proceeds to point out the manner of providing the funds to pay for the force. Without the action of the police board the city authorities have no power to appropriate a dollar on account of the appointments of the board.

It is needless to look to the language of courts in other jurisdictions, in passing on the liability of cities for injuries and other accountability consequent upon the omission of certain duties by commissioners appointed from without. This act is *sui generis*. Its purpose, language and affirmative provisions are such as to preclude the idea of a suit directly against the city for the imputed misconduct of the police commissioners. The power to employ and dismiss policemen is lodged with the commissioners, the officers of the state. The city has no voice in the matter. It can neither control nor make suggestions to the commissioners in such matter. The commissioners are the functionaries and agents of the state, and not of the city, in employing and discharging policemen. They are not accountable to the city for their action. The city is more the agent of the

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commissioners in enabling them to carry out the legislative powers. The commissioners employ, control, and fix the compensation of the policemen. It is the bounden duty of the city government to appropriate the necessary funds on the requisition of the police board to pay the policemen, and not otherwise; and it would be compelled, at the relation of the police board, to proceed to make such appropriation. It can only pay upon the warrant of the board.

If the board of police commissioners, as alleged, wrongfully dismissed the plaintiff from his office, without cause and trial, he had a clear remedy by *mandamus* to compel his reinstatement. High on Extr. Rem., secs. 67, 68, 69.

The city being without power to pay the policemen without first having a warrant from the police commissioners this action must fail.

The other judges concurring, the judgment of the circuit court is reversed, and the petition dismissed.

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37	278
39	366
31	447
51	542
31	447
68	296

PHILO L. MILLS *et al.*, Respondents, v. J. V. WILLIAMS *et al.*, Appellants.

Kansas City Court of Appeals, June 13, 1888.

1. CONTRACT—CHARACTER OF INSTRUMENT IN CONTROVERSY—CASE ADJUDGED.—The court, after a brief discussion of the terms and provisions of the instrument in controversy here, as to its legal effect, concludes that it possesses the qualities and characteristics of a conveyance in trust to pay debts, rather than that of a conveyance as a security for debts; that it is a deed of assignment and not a mortgage.

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2. ASSIGNMENT—ESSENTIAL QUALITIES OF A DEED OF—QUALITIES OF MORTGAGE.—The essential qualities of a deed of assignment are, that it is a transfer of property by a debtor, supposed to be in insolvent circumstances, to an assignee, in trust, to apply the same to the payment of debts. The title of the property passes, *eo instanti*, to the trustee; it is divested out of the debtor, without any equity of redemption. The trustee takes it, however, subject to the uses of the creditors. A mortgage is conditional and defeasible, and is a pledge of property as security for the payment of money or the performance of some other act.

APPEAL from Audrain Circuit Court, HON. E. M. HUGHES, Judge.

Affirmed.

Motion for rehearing denied.

Statement of case by the court.

This is a proceeding in equity to have a certain instrument of writing declared a deed of assignment for the benefit of creditors, and to enjoin the trustee from executing the same as a chattel mortgage, and for other relief. The facts are as follows: On the twenty-eighth day of July, 1886, Martha E. Botts, a *feme sole*, was engaged in a general mercantile business at Mexico, Missouri. Becoming insolvent, on that day she executed the following instrument of writing, duly acknowledged and recorded:

"Know all men by these presents that I, the undersigned M. E. Botts, of Audrain county, Missouri, party of the first part, have this day, for and in consideration of the sum of [here follows an enumeration of various sums owing by her to various creditors named] do by these presents grant, bargain and sell, and convey unto the said [parties, naming them], a stock of dry goods consisting of piece-goods, notions, boots, shoes and all other merchandise, now in the store occupied by me and owned by W. H. Kennan and situated on the north side of the public square in the city of Mexico, and including show-cases, safe, and all other furniture and fixtures

in and about said store-room and owned by me, upon the following conditions:

"That, whereas, I am indebted to the above-named grantees as follows:" [setting out the names of the said creditors, and the sums respectively owing them]. The deed then continues as follows:

"Now if the said debts are paid by the sale of the goods, wares and merchandise herein transferred, as hereinafter set forth, within ninety days from this date, this mortgage to be void."

The further conditions of this mortgage are as follows, to-wit: "That the said grantees herein are to take immediate possession of the goods, wares and merchandise herein transferred by their agent, J. V. Williams, which said agent shall take absolute control of said property, and shall proceed to sell the same for cash at retail at not less than first cost price of any of said goods and merchandise. But it is fully understood and agreed by the parties hereto that said Williams shall have full authority to sell all of said goods at wholesale at a discount not greater than twenty per cent. on first cost price. Said Williams shall have power to advertise said goods for sale and shall keep a full and accurate account of all sales made and money received, and shall render a weekly statement for the benefit of said grantees herein of all business transacted.

"The proceeds of said sales shall be disposed of as follows: First, the execution of this mortgage, advertising and actual running expenses of said business, including compensation to said Williams in the sum of seventy-five dollars ($75) per month, and rent for said building shall be paid. Second, the proceeds over and above said expenses shall be divided weekly *pro rata* among the grantees herein. But if at any time after taking possession of said store the sales for a period of ten days shall not exceed the expenses of said business, said Williams shall in his discretion immediately proceed to sell said goods and merchandise, after giving five days' notice, at auction by retail or wholesale.

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"It is further agreed that if, at the end of ninety days from this date, all of said debts are not paid, then the said Williams shall, at the request of any of the grantees herein, after giving five days' public notice, proceed to sell said property herein conveyed, or as much as may be necessary, at auction, for cash to pay any balance due on said debts.

"Witness my hand and seal this July 28th, 1886.

[Seal] "MARTHA E. BOTTS."

The petition alleges that the plaintiffs are creditors of said M. E. Botts, representing debts due and owing by her to them, amounting in the aggregate to about $419.93, which are not provided for in said instrument; that said deed is not operative as against them; that it is, in fact, a deed of assignment, attempting to prefer the named creditors contrary to the provisions of the statute concerning deeds of assignment; praying that said Williams be enjoined from paying out the funds in his hands as therein provided; that said deed be adjudged a deed of assignment, and executed accordingly, so that the said property, or the proceeds thereof, may be distributed *pro rata* among all the creditors of said M. E. Botts, and for proper relief.

The answer, after setting forth the said deed, alleged:

"That the said agent, J. V. Williams, proceeded to take charge of said goods, to sell them in accordance with the terms of said mortgage, and otherwise perform his duties under said mortgage, and was in the due discharge of the same when enjoined in this proceeding. Defendants allege that the statement of said debts, as made in said mortgage, is a true exhibit of the indebtedness of M. E. Botts to said defendants, and that said mortgage was given in good faith to pay the same. Defendants deny that said mortgage is a voluntary assignment, as alleged by plaintiffs, and deny each and every other allegation in said petition set forth."

At the trial, the plaintiffs, against the objection of

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defendants, introduced evidence which tended to show that said M. E. Botts owed the debts mentioned in the deed, as also the sums of money claimed by plaintiffs; that the goods conveyed were estimated to be of greater value than the debts named therein; that the aggregate amount of the debts enumerated in the deed was about forty-five hundred dollars, and that said Botts owned very little, if any, other property subject to execution.

The court stated, at the time this evidence was offered, that, as the cause was being heard by the court, he would hear the evidence, and pass upon its admissibility afterwards. There is nothing in the record to show that the court afterwards excluded it. The court found the issues for the plaintiffs, adjudging the instrument to be in effect a deed of assignment for the benefit of creditors, and directing the said Williams to give bond, and to proceed to execute the trust, and distribute the proceeds of the property in his hands pursuant to the provisions of the statute respecting assignments for the benefit of creditors. Defendants have appealed.

F. C. BRYAN, GEO. ROBERTSON, P. R. JESSE, J. G. TRIMBLE, and S. M. EDWARDS, for the appellants.

I. The admission of the oral testimony was error, because it was incompetent. It did not prove anything, and should have been excluded.

II. The instrument executed by Mrs. Botts is a mortgage. A mortgage is an instrument in writing in the nature of an absolute sale—with a condition. Herman Chat. Mort., sec. 18; Bouvier's Law Dict., title Mortgage. Generally speaking, whenever a transaction resolves itself into a security for a debt, it is a mortgage. The Law of Mortgages (Boone) sec. 1; *Wilnerding v. Mitchell*, 42 N. J. (Law) 476; *Lyon v. Lyon*, 67 N. Y. 250; *Reed v. Langdale*, Hardin (Ky.) 6; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Peckham v. Haddock*, 36 Ill. 38; *Wilcox v. Morris*, 1 Murph. 116; 3 Am Dec. 678. The whole of the instrument will be looked to to ascertain the intent of the parties as to

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whether it constitutes a mortgage. The words "we mortgage the property", when accompanied by a provision for sale in case the money secured be not paid, are sufficient to constitute a mortgage. Law of Mort. (Boone) sec. 3; *DeLeon v. Higuera*, 15 Cal. 483; *Harris v. Jones*, 83 N. C. 321. The essentials of a mortgage are: First, grantor, mortgageor; second, consideration, *i. e.*, debt or liability of grantor to grantee; third, grantee, mortgagee; fourth, property or estate; fifth, defeasance or condition. Usually mortgages contain two parts, the conveyance and the defeasance. Herman Chat. Mort., sec. 19.

III. A debtor has the right to prefer creditors. *Henderson v. Henderson*, 55 Mo. 534; *Sampson v. Shaw*, 19 Mo. App. 274; *Shelley v. Boothe*, 73 Mo. 74; *Holmes v. Braidwood*, 82 Mo. 616; *Gage v. Perry*, 24 Cent. Law Jour. 10; 69 Ia.; 29 N. W. Rep.; *Clark v. White*, 12 Peters, 178.

IV. The mortgagees had a right to take possession of the property, and by so doing, in good faith, any defect in the mortgage, either void or voidable, as to other creditors is cured, and the instrument becomes operative as a mortgage. *Petring v. Chrisler*, 90 Mo. 649; *Hansman v. Hope*, 20 Mo. App. 193.

V. (*a*) The instrument executed by Mrs. Botts is in perfect harmony with the law of mortgages of merchandise as declared by the decisions of this state. *Sampson v. Shaw*, 19 Mo. App. 274; *Caton v. Collins*, 2 Mo. App. 225; *Petring v. Chrisler*, *supra*; *Metzer v. Graham*, 57 Mo. 404; *Webber v. Armstrong*, 70 Mo. 217; *Hewson v. Tootle*, 72 Mo. 632; *Cohran v. Cooper*, 79 Mo. 464; Rev. Stat., sec. 2503. (*b*) At common law, in the absence of express stipulation, a mortgage gives the right to immediate possession to the mortgagee and he may recover it by suit. Law of Mortgages (Boone) sec. 3; *Goodman v. Richardson*, 11 Mass. 479; *Jamison v. Bruce*, 26 Am. Dec. 557; *Howard v. Haughton*, 64 Me. 445. (*c*) Although a mortgage is considered a security only, and as not passing the mortgageor's

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title to the mortgagee, yet by express stipulation the mortgagee may take possession of the estate or property. *Drake v. Root*, 2 Col. 685; *Skinner v. Buck*, 28 Cal. 253; *Walker v. Johnson*, 37 Tex. 139; *Willis v. Moore*, 59 Tex. 628; *Reading v. Waterman*, 46 Mich. 107; *Courtney v. Carr*, 6 Iowa, 237; Boone Law Mort., sec. 3.

VI. A mortgageor may appoint a mortgagee as well as any other person to sell his property for the purpose of satisfying his debts. Herman Chat. Mort., sec. 213; *Milroy v. Farber*, 37 Mo. 71.

VII. (*a*) An insolvent may dispose of his entire estate by chattel mortgage and partial assignment to secure particular creditors, and such conveyances will not constitute a general assignment when made with the *bona-fide* intention of securing particular creditors, and not with the intention of disposing of the insolvent's estate for the benefit of creditors. *Gage v. Perry*, *supra.* (*b*) A conveyance to a single creditor to sell and pay his own debt, and turn over the residue to assignor has been held a chattel mortgage. *Dessar v. Field*, 99 Ind. 548; *Dunham v. Whitelaw*, 21 N. Y. 131; *Bench v. Besler*, 49 Ill. 521. (*c*) A transfer of the whole of an insolvent's estate to one or more creditors, in payment, is not a general assignment. *Harkin v. Bailey*, 43 Ala. 376; *Atkinson v. Jordan*, 5 Ohio, 178; *Milroy v. Farber*, 37 Mo. 71; *United States v. McClellen*, 3 Sumner (U. S. C. C.) 345. (*d*) The distinguishing features between a voluntary assignment for the benefit of creditors and a mortgage are, that in assignment the conveyance is made to a trustee, and made necessarily by an insolvent (*Ogden v. Peters*, 15 Barb. [N. Y.] 560); it must purport to convey all of the assignor's property. *United States v. Clark*, 1 Payne, 629; *United States v. Mott*, 1 Payne, 188; *Musey v. Noyes*, 26 Vt. 462; *Bishop v. Hart*, 28 Vt. 71. And it must purport to be for all creditors. A special or particular assignment is distinguishable from a general assignment, for the former is made directly to the creditor in payment or as

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security, and in this sense a sale to pay, or a mortgage to secure a debt, may be a special assignment and not a general assignment for the benefit of all creditors. Burr. on Assign. [2 Ed.] 101. (*e*) One main distinction is, that a voluntary assignment is an absolute appropriation of the property conveyed to the payment of the assignor's debts; while a mortgage is a conveyance for the purpose of securing a debt subject to a condition of defeasance. *Crow v. Beardsly*, 68 Mo. 435, and authorities there cited.

VIII. There was no testimony offered by plaintiffs that they had any debt against Mrs. Botts. The findings of the court are not sufficient upon which to base the judgment rendered. The findings as set forth in the judgment are not at all inconsistent with the claim of defendants, that the instrument executed by Mrs. Botts is a mortgage or sale to pay debts.

IX. The case of *Smith & Keating Imp. Co. v. Thurman*, 29 Mo. App. 186, is decisive of this case.

Fry & Mosby, for the respondents.

I. The case was tried by the court with the understanding that it would exclude incompetent evidence as it made its finding. Objections to evidence not distinctly stated will not be considered. *Coughlin v. Hannesler*, 50 Mo. 126.

II. M. E. Botts was insolvent. She conveyed all her property except her homestead, which she occupied with a single daughter, and which was exempt. *Leak v. King*, 85 Mo. 413; *Davis v. Land*, 88 Mo. 436. An exception of a part of the grantor's property, "whether by accident or design, will not alter the character of the conveyance." Burrill on Assignments, 88.

III. While a debtor can prefer creditors, such preference is not looked upon with favor. Deeds of assignment are "favored by the law, and upheld by the courts." *Douglass v. Cissna*, 17 Mo. App. 60.

IV. If the instrument in question is a deed of assignment it must be for all of the debtor's creditors,

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and the property assigned disposed of by the trustee and the trust executed in pursuance with the provisions of the assignment act. Rev. Stat., sec. 354. Our statutes "forbid preference in and by the instrument by which the debtor surrenders to his creditors all dominion over his property." *Simpson v. Shaw*, 19 Mo. App. 280; *Manna v. Logun*, 27 Mo. 528; *Douglass v. Cissna*, *supra*.

V. The real issue is whether the instrument of writing is a deed of assignment or a mortgage. (*a*) To determine this the court looks to the face of the instrument and not to the intention of the parties. "It must stand or fall by the character impressed upon its face." *Douglass v. Cissna*, 17 Mo. App. 62. "The court is bound to look to the paper itself for the intent of the instrument, and not beyond it. Even in equity an instrument must stand as written if deliberately adopted by the parties, although they mistook its legal intent." Jones on Chat. Mort., secs. 9, 10. (*b*) An assignment is an absolute conveyance of the property to a trustee for the purpose of raising funds to pay debts. It is a conveyance of the property so that the grantor loses control of it. He cannot recover it back by any act of his. It is an unconditional conveyance. Such is this deed. 1 Burrill on Assignments, 12; *Crow v. Beardsley*, 68 Mo. 438. Here it is said: "The distinction is, that an assignment is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt subject to a condition of defeasance." *State to use v. Benoist*, 37 Mo. 508. "It does not purport to be a security for a debt, with power to sell if the debt be not paid when due. It conveys the property absolutely to trustees to be sold for the payment of debts named and preferred in it. It is clearly a partial assignment for the benefit of creditors, and not a mortgage security. Such instruments have always been treated as assignments." *Woodruff v. Robb*, 19 Ohio, 215. "If the conveyance be made as

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collateral security for the payment of money * * * to be effectual only on the nonpayment of the money * * * it ts a mortgage. * * * Now the difference between a conveyance to a trustee for the purpose of raising a fund to pay debts and a conveyance for the purpose of securing a debt in case of the default of the debtor, by a time limited, is very apparent. In the first case the title is vested absolutely by the conveyance itself in the grantee, for the purpose of the trust. The intention of the grantor is to part absolutely with his title. In the latter case if the grantor performs his legal obligation according to its terms he retains his property. His title is as perfect as if such conveyance had never been made.'' In the deed before the court there was no condition for the grantor to perform. She could not pay the debts and hold the property. It was a conveyance to the trustee of the grantees to sell in his discretion and raise funds to pay the debts therein named. *Sampson v. Shaw*, 19 Mo. App. 280. "The mortgage is conditional to secure debts and against liabilities; the assignment is absolute to pay creditors.'' *Lampson v. Arnold*, 19 Iowa, 481; *Jeffries v. Blackman*, 86 Mo. 350; *Goodwin v. Kerr*, 80 Mo. 276. Here the distinction is drawn between a deed of assignment and a sale, also a mortgage. Appellants claim that the case of *Smith Co. v. Thurman*, 29 Mo. App. 186, is decisive of this case. In that case the character of the instrument was not necessarily determined; and so far as applicable it is favorable to us. So also is *Douglass v. Cissna*, 17 Mo. App. 44. After the instrument is executed no subsequent act of the grantor, grantees or trustee can vitiate or affect the deed, or make it less a deed of assignment. *Gates v. Labeaume*, 19 Mo. 17; *Douglass v. Cissna*, 17 Mo. App. 60; *Goodwin v. Kerr*, 80 Mo. 282; *Adler v. Lange*, 21 Mo. App. 520.

VI. We insist that the instrument is a deed of assignment and should be executed as such. If it is a mortgage it is fraudulent and void in that by its terms it protected the property in the hands of the grantees from

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the claims of other creditors outside of the conveyance for an unlimited period, in that the business was to be conducted as before by the grantees' agent until closed out by the orders of the grantees. Therefore, it was in the interest of the grantor. *State to use v. Mueller*, 10 Mo. App. 88; *Bigelow v. Stringer*, 40 Mo. 195; *Wood & Co. v. Hall*, 23 Mo. App. 110.

VII. All the evidence is not presented to this court and this court will not question the finding of the lower court on the evidence as to the insolvency of the grantor and other questions of fact. The only issue presented here is whether the instrument on its face is a deed of assignment. *Spurling v. Conway*, 6 Mo. App. 284; *Berberet v. City of Edina*, 19 Mo. App. 550.

PHILIPS, P. J.—I. The chief question presented for our determination is, what is the legal character of the written instrument? Is it a bill of sale, a chattel mortgage, or a deed of assignment?

It is not a bill of sale, because no actual consideration was paid, or agreed to be paid, for the property conveyed; nor were the debts thereby extinguished, so as to irrevocably pass the title, without any condition or trust attached thereto, or any reversionary interest in the seller.

It is either a chattel mortgage, or a deed of assignment. It is made by a debtor to creditors, the consideration being the existing debts; and the conveyance is coupled with a trust to be kept and performed by the grantees, as a means of accomplishing payment of said debts; and there would, by equitable implication, arise a reversionary right in the grantor to any surplus after satisfaction of the debts out of the property conveyed.

II. In some respects this deed is unique. To define its exact character and determine whether it should be assigned to the class of chattel mortgages or deeds of assignment is by no means free from embarrassment. Viewed as a chattel mortgage, it is peculiar in many

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respects. Nowhere does it, in terms, declare that it is given to secure the payment of the designated debts; nor does it provide for, nor contemplate the exercise of the right by the grantor to defeat the sale of the property conveyed by paying off the debts, otherwise than by a sale of the property; nor does it seem to anticipate that any residue might remain for the grantor; or provide for the reversion. These are certainly the usual incidents of a mortgage.

On the contrary, the debts of the grantor are only named as the consideration of the conveyance; the transfer, in terms, is absolute, with no clause of defeasance on performance by the grantor. The grantees, by designated agent, are to take immediate and absolute control and possession of the property, and proceed unconditionally to sell the same, and distribute the proceeds among the designated creditors.

It possesses, therefore, the qualities and characteristics of a conveyance in trust to pay debts, rather than a conveyance as a security for debts.

The authorities all concur in holding that one of the distinguishing characteristics of a mortgage is, that it purports to be a *security for debt*. Jones' Chat. Mort., secs. 1, 34; Jones on Mort., sec. 60; *Harris v. Jones*, 83 N. C. 321, 322, and *loc. cit.*

In *Crow v. Beardsley*, 68 Mo. 438, the language of Burrill on Assignments is approved, that an assignment is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of *securing a debt* subject to a condition of defeasance.

So in the recent case of *Smith & Keating Implement Co. v. Thurman*, 29 Mo. App. 186, we have said: "A mortgage is a conveyance of an estate by way of a pledge, for the *security* of a debt, to become void upon payment of it, or a conditional conveyance of land designed as security for the payment of money, the fulfilment of some contract, or performance of some other act, and to be void upon such payment or performance."

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III. The essential qualities of a deed of assignment are, that it is a transfer of property by a debtor, supposed to be in insolvent circumstances, to an assignee, in trust to apply the same to the payment of debts. The object is to raise a fund to pay the debt. The conveyance does not satisfy the claim to any extent, but merely provides a method for raising the means with which to pay. The title of the property passes, *eo instanti*, to the trustee; it is divested out of the debtor, without any equity of redemption. The trustee takes it, however, subject to the uses of the creditors. Authorities *supra;* Burr. on Assign., secs. 2, 4, 6.

This distinction is aptly put in *Hoffman & Co. v. MacKall*, 5 Ohio St. 130: "There is a manifest and well-settled distinction between an unconditional deed of trust, and a mortgage or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject-matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate, or pledge of property, *as security* for the payment of money, or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of *security*, subject to a condition of defeasance, or redeemable at any time before the sale of the property. * * * By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee *for the purpose of raising a fund to pay debts;* while the former is a conveyance in trust for the purpose of *securing* a debt, subject to a condition of defeasance;" citing *Woodruff v. Robb*, 19 Ohio, 216; Hill Mort. 359. While the purpose to make a deed of assignment is better expressed by the designation of a trustee or assignee in the deed, this is not essential; but the deed may be made, as was done in this instance, to the creditors, with a designated agent of the creditors to

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act in such capacity. Burr. on Assign., sec. 3, and notes 3 and 4. And while it is true that such conveyances are supposed to be made by persons in insolvent circumstances, and to transfer all the property of the grantor, it is not essential that the grantor should in fact be absolutely insolvent, provided he really believes himself to be unable to proceed in business; or that the deed should in fact cover all his property. Burr. on Assign., sec. 3, p. 6; *Mussey v. Noyes*, 26 Vt. 474. As said in the last-named case: "A general assignment must include, substantially, all a man's property; and a partial assignment must omit some substantial portion of the property, and cannot be made to rest upon a mere colorable omission. * * * If the property omitted was insignificant in amount, with reference to the whole, or if it was mainly beyond the reach of process, or of such a character as not readily to be made available, either to the creditors, or the debtor, and the great mass of the debtor's available property, which constituted the basis of his business operations, and which alone could form any reliance to himself for support, or to his creditors for payment, was included in the deed, the deed should undoubtedly be regarded as a general assignment." And this is always a matter of proof *aliunde.* 26 Vt. *supra*, 475. The evidence in this case shows that the property conveyed would bring this case within the terms of a general assignment. The conveyance actually ended the business operations of Mrs. Botts. It embraced all her available assets. The rest either constituted a homestead, or was covered by antecedent obligations to convey. She may have had some outstanding accounts, of unascertained amount. Be this as it may, our statute applies to "every voluntary assignment of lands, tenements, goods, chattels, and credits made by a debtor to any person in trust for his creditors." And it makes such conveyance, be it of all or a part of the debtor's estate, inure to the benefit of all the creditors, *pari passu*. *Crow v. Beardsley, supra; Douglass v. Cissna*, 17 Mo. App. 44.

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IV. Tried by these tests, I cannot see how this deed can be upheld as a chattel mortgage. The mere calling it a mortgage by the draftsman could not make it such, any more than designating it an assignment could make it one. *Kohn Bros. v. Clement Co.*, 58 Ia. 593. While this might evidence the intention of the parties, and aid in the construction of a doubtful instrument, it could not prevent the operation of the expressed terms of the instrument viewed in every part. The only sentence in the deed giving any semblance to a conditional conveyance with a defeasance, is the following: "Now if the said debts are paid by the sale of the goods, etc., herein transferred, as hereinafter set forth, within ninety days from this date, this mortgage to be void." It is to be observed that this language does not contemplate that the grantor is to, or may, defeat the forfeiture and sale by discharging the debts, but the debts are to be paid by a *sale of the goods*, within ninety days. To add after this, "this mortgage to be void", is a legal solecism. For how, in law and reason, could the conveyance be void after it had operated, and the trustee thereunder had actually disposed of the property to raise the means of discharging the debts?

Any surplus remaining after paying the debts would, by operation of law, with or without any expressed provision therefor, revert to the grantor. This condition, taken in connection with those thereafter "set forth," shows that it was contemplated and intended that the whole of the goods should be sold, and the proceeds distributed among the creditors unreservedly and at all events.

V. We would not be understood as going so far in this discussion, as to hold, that if any appropriate language had been employed in the instrument to indicate that the conveyance was made as a mere pledge or security to secure the payment of the debts named, its character as a mortgage would have been destroyed, merely because it authorized the mortgagee, or trustee,

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to proceed at once to sell the property. *Gage v. Chesebro*, 49 Wis. 486, 491.

That was substantially the case of *Smith Imp. Co. v. Thurman, supra*, though the fact was not so fully developed in the opinion, perhaps, as it should have been. The mortgage there expressly declared, *inter alia:* "This conveyance is made for the purpose of securing the payment of said debts." It also contained the condition: "Now, if said party of the first part shall well and truly pay and discharge said debts in full, according to the tenor and effect of said notes, at any time before any or all of said property herein conveyed shall have been disposed of by said trustee, then as to said property, or the residue thereof, this conveyance shall be void," etc.

Nothing of the sort appears in this deed. Our conclusion is, that the circuit court properly construed the instrument to operate as a deed of assignment, and to be enforced pursuant to the statute concerning assignments for the benefit of creditors.

The other judges concurring, its judgment is affirmed.

On motion for rehearing.

PHILIPS, P. J.—We shall make no comment on the spirit manifested in the motion for rehearing in this case. Our office is to ascertain and follow the law as we are able to understand it. We will only say that the question of law presented by the record, as to whether the deed in question was a chattel mortgage or an assignment, was an important one, and gave us much thought; and we reached the conclusion of the opinion after the most mature consideration. Reaching the conclusion as we did, in harmony with that of the learned trial judge, that the instrument was a deed of assignment, it for all practical purposes ended this controversy.

I. The criticisms made by counsel, in their motion for rehearing, on the opinion of the court, in many

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respects, are most trivial. They go to verbal inaccuracies, or clerical mistakes in transferring the opinion to the type copy, in no manner reaching or affecting the merits. For instance, the statement of facts is criticised because it was inadvertently stated that the amount of the plaintiff's claim against Mrs. Botts was $1,500, instead of $419.93. The draftsman of the statement of facts was led into the inaccuracy by confounding the evidence of the claim outside of the deed with the sum of plaintiff's demand. This, however, in no wise affects the merits. And the opinion will be accordingly amended.

Again the opinion is criticised because of the clerical error in the statement of facts, that the "defendant, against the objection of plaintiffs, introduced" certain evidence. The parties were simply transposed, and the opinion is accordingly corrected. But how are the defendants injured thereby? The answer made in the motion for rehearing is, because the court did not consider defendants' objection to the admissibility of this evidence. If, as a matter of law, as held in the opinion, the deed on its face is a deed of assignment, that evidence amounted to nothing one way or the other. But it was perfectly competent for the plaintiff to introduce evidence to show that, as a matter of fact, the property covered by the conveyance embraced all the available assets and property of the assignor, as bearing upon the question of the intent of the party in making the deed, or whether it was a general or partial assignment. So the opinion states, "this is always a matter of proof *aliunde*. 27 Vt. 475." And even had this evidence been inadmissible, it would have constituted no reversible error, for the reason, as held in the opinion, our statute applies as well to partial as to general assignments.

II. Criticism is made of the opinion for the assertion that the conveyance by Mrs. Botts ended her business operations. "It embraced all her available assets. The rest either constituted a homestead, or was covered

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by antecedent obligations to convey. She may have had some outstanding accounts of unascertained amount." These statements are fully sustained by the evidence of J. G. Trimble and W. W. Fry.

III. The observations of the court touching the fact that the instrument is not a bill of sale are criticised. We can only say that we followed in this matter Burrill on Assignments, section four.

It is true that the forgiving of the debts owing by the vendor would constitute a sufficient consideration for a sale. But there is no pretense that the debts were extinguished, or any part thereof, by the transaction, or intended to be. On its face it was a conveyance in trust to raise a fund to pay the debt, and, therefore, was not a sale. What is the purpose of counsel in this discussion, we are unable to understand. Is it to assume the position that the instrument in question is a bill of sale? They tried the case below on the theory that it is a chattel mortgage, and so they contended on the appeal. The only other question in this connection, presented by the motion, of any merit, is the contention that the closing paragraph of the deed indicates the purpose on the part of the grantor to reserve the right of redemption: "It is further agreed that, if at the end of ninety days, from this date, all of said debts are not paid, then the said Williams shall, at the request of any of the grantees herein, after giving five days' public notice, proceed to sell said property herein conveyed, or as much as may be necessary, at auction, for cash, to pay any balance due on said debts."

This paragraph did not escape the attention of the court. It so palpably refers to the preceding matter of the deed, as to the course to be pursued by the trustee in disposing of the goods, that we did not deem it important to prolong the opinion by its discussion. As stated in the opinion with reference to the first paragraph, respecting the payment of the debts "within ninety days from this date," the whole deed clearly shows that the contemplation of the parties was, that

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this payment should be made by the trustee out of the sale of the goods. The deed then directs Williams to take immediate possession, and, first, sell for cash, at retail, at not less than first cost; second, he is authorized to sell at wholesale, at a discount not greater than twenty per cent. on first cost. This is followed by a third provision, which authorizes the trustee, "if at any time after taking possession of said store, the sales for a period of ten days shall not exceed the expenses of said business," to sell at auction on five days' notice. Then follows the final provision above quoted. The manifest design and clear purport of this clause was to provide that in no event should the trustee retain the goods longer than ninety days, if the beneficiaries should request him to sell at auction at the end of that period. When the ninety days had expired, if the trustee had not then realized sufficient funds out of the sales then made to satisfy the debts named, the grantees had the option to have the trustee sell at auction, for any price he could obtain, to raise the fund necessary "to pay any balance due on said debts." This, to our mind, is the obvious meaning and intent of this paragraph; and it is in perfect harmony with the preceding provisions of the instrument, which contemplated that the property should be taken into the immediate possession of the trustee to raise a fund to pay debts, without providing for, or contemplating any equity of redemption.

IV. To hold, as now requested by appellants, that the inference of a conveyance as a mere security for a debt may be drawn from the language: "Whereas, I am indebted to the above-named grantees," would make any deed of assignment a chattel mortgage, for that is the usually expressed consideration of a deed of assignment.

The case of *Steele ex rel. v. Faber*, 37 Mo. 72, referred to by counsel, is so obviously unlike the case at bar, as to scarcely deserve discussion. There the

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mortgage not only expressed that it was given to secure the debts, but it showed on its face that part of the claims to be secured arose out of the relation of principal and surety, and it was designed to indemnify the surety, who would have no cause of action, or claim demandable, against the mortgageor, until the surety should pay the debt for the principal. Again it expressly provided that, "if the grantor pays his individual indebtedness, and saves harmless his copartners and securities against their said liabilities, the deed to be void." And the right to proceed on it was made to depend upon default in making such payments. And nothing was said as to the right of the mortgagee to take possession.. It was by implication that the court held the right of the mortgagee to take possession on default existed.

V. It is again suggested in the motion for rehearing that we should transfer this case to the Supreme Court, on the ground that the amount involved exceeds the jurisdiction of this court. This question, so far as this court is concerned, has become *rem judicatum.* The appeal was originally taken to the Supreme Court. There the respondents filed motion to have the cause transferred to this court, on the ground that the real subject-matter of the controversy was within the jurisdiction of the court of appeals. On consideration, the motion was sustained by the Supreme Court, and the cause, by order of that court, was accordingly transferred. After the same was filed in this court the appellants presented motion here to have the cause re-transferred to the Supreme Court. That motion was, on consideration, overruled, as we felt concluded by the action of the Supreme Court.

It follows that the motion herein is denied. All coucur.

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WILLIAM D. PALMER, Respondent, v. THE CONTINENTAL INSURANCE COMPANY, Appellant.

31 467 | 36 608 | 31 467 | 45 432 | 31 467 | 61 600 | 31 467 | 89 78

Kansas City Court of Appeals, June 13, 1888.

1. CONTRACT—INSURANCE POLICY—PREMIUM NOTE—HOW CONSTRUED—CASE ADJUDGED.—Ordinarily the premium note, in the case of a contract of insurance, is deemed a part of the contract between the insurer and the insured, the contract consisting of the policy and the note. Where the insured is alone mistaken as to the character of the instrument he was signing (as in this case), and no fraud or deception is alleged or shown, this is not sufficient to relieve him from the obligation imposed by the premium note as a part of the contract of insurance. It was his duty to read it, and in the absence of proof of fraud, deceit, or imposition, the law presumes he has knowledge of its contents.

2. —— —— STIPULATION IN NOTE—CASE ADJUDGED.—Where there is a stipulation in the premium note (as in this case), making the whole amount unpaid on the policy earned, due, and payable in case of nonpayment of any instalment when due, except in the event of settlement by the assured "for time expired as per terms on short rates," it is a part of the contract of insurance, and such stipulation is a valid and binding one: and the collection by the insurer of all the unpaid instalments after the loss, which occurred during the default, with knowledge thereof, did not waive the provision of the policy, exempting the insurer from liability for a loss occurring during such default.

APPEAL from Vernon Circuit Court, HON. W. J. STONE, Special Judge.

Reversed and remanded.

Statement of case by the court.

This was a suit upon a policy of fire insurance. The policy was issued on the instalment plan, and contained the following clause: "5. This company shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any instalment premium due by the terms of the instalment note. On payment to the company in New York or to the western

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department in Chicago by the assured or assigns of all instalments of premiums due under this policy and the instalment note given thereon, the liability of this company in this policy shall again attach and this policy be in force from and after such payment, unless this policy shall be void and inoperative for some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment, nor shall any such suspension of liability under this policy on account of such default have the effect of extending such liability beyond the period of its termination as originally expressed in writing herein. It is further provided that no attempt by law or otherwise to collect any note given for the cash premium or any instalment premium due upon any instalment note shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive this policy; but upon payment to the company in New York or to the western department in Chicago by the assured or his assigns of the full amount due upon such notes and costs, if any there be, this policy shall thereafter be in full force unless the same be inoperative or void for some other cause than the nonpayment of such note."

At the time of receiving the policy, the plaintiff paid eight dollars and executed the following instalment note:

"$32.00. The company is authorized to insert in this note the number and date of policy.

"For value received, in policy No. B. F. 505,215, dated the —— day of ———, 18—, issued by the Continental Insurance Company of New York, — promise to pay to said company or order (by mail, if requested) thirty-two dollars, in instalments, as follows: Eight dollars and —— cents upon the first day of December, 1884, and eight dollars and —— cents upon the first day of December, 1885, and eight dollars and —— cents upon the first day of December, 1886, and eight dollars and —— cents upon the first day of December, 1887, without

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interest, and it is hereby agreed that, in case of non-payment of any of the instalments herein named at maturity, this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until payment is made to this company in New York, or to the western department at Chicago, and in the event of nonsettlement for time expired as per terms on short rates, the whole amount of instalments remaining unpaid on said policy may be declared earned, due and payable, and may be collected by law.

"Given in payment for a policy of insurance. If transferred, either before or after maturity, this obligation shall be subject to all defences as if owned by the payee herein named."

The plaintiff testified that he read over and counted up the amounts of the note, but did not read the balance of it, and signed it believing and understanding that he was signing a plain note of hand for the payment of thirty-two dollars.

The loss occurred on December 24, 1885. The instalment due on the first of that month was still due and unpaid at the time of the loss. In July, 1886, the plaintiff paid to the defendant the unpaid balance of the premium.

There was evidence of the note having been sent out from the defendant's office for collection by mistake, but this evidence need not be further noticed for the purposes of this report.

The court gave the following instructions for the plaintiff:

"6. The jury are instructed that, after default in the payment of the instalment due December 1, 1885, the liability of the defendant was suspended, but if, after plaintiff's loss by fire on December 24, 1885, the defendant, by its duly authorized agents, demanded and received of plaintiff the unpaid instalments due on the note executed by the plaintiff for the premium, with full knowledge at the time of plaintiff's loss, then the

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policy was revived, and the finding should be for the plaintiff, not exceeding eight hundred dollars."

"7. The court instructs the jury that if they believe, from the evidence, that the plaintiff made a contract of insurance with defendant as contained in the copy of policy offered in evidence, and which was exhibited to him by defendant's agent and delivered to him as the contract, and that when plaintiff signed the instalment note he believed and understood that he was signing a simple note of hand for the payment of the premium, then plaintiff is not bound by the conditions of insurance embraced in said note."

From a judgment against it, the defendant has appealed to this court.

Gates & Wallace, for the appellant.

I. The giving of the eighth instruction for the plaintiff was error because (referring to witnesses testifying falsely) (1) it omitted the element of wilfulness or knowledge on the part of the witness swearing falsely; and (2) there was nothing in the case on which to base it. *Smith v. Railroad*, 19 Mo. App. 120; *Fath v. Hake*, 16 Mo. App. 537; *Shelnutt v. Bruegestradt*, 8 Mo. App. 46; *Evans v. Railroad*, 16 Mo. App. 522; *Bank v. Murdoch*, 62 Mo. 70; *State v. Brown*, 64 Mo. 367; *State v. Elkins*, 63 Mo. 159; *White v. Maxey*, 64 Mo. 552; *Batterson v. Vogil*, 10 Mo. App. 235; Wharton on Evid., sec. 412.

II. The policy delivered by the insurer and the premium note delivered by the insured embraced the obligations incurred by each and constituted the contract of insurance. *Shultz v. Ins. Co.*, 42 Iowa, 239; 1 Wood on Fire Ins. [2 Ed.] 12; *Rogers v. Smith*, 47 N. Y. 327; *Shaw v. Ins. Co.*, 67 Barb. 586; *Ins. Co. v. Klink*, 65 Mo. 78; *Pitt v. Ins. Co.*, 100 Mass. 500; *Greenfield's Estate*, 14 Pa. St. 501; *Jackson v. Dunbaugh*, 1 Johns. Cas. 95, *Hamilton v. Elliott*, 5 Serg. & R. 375, 380; *Gorton v. Ins. Co.*, 39 Wis. 121.

III. The court erred in instructing the jury that if

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the plaintiff believed and understood that he was signing a plain note of hand for the payment of the premium when he signed the instalment note, he was not bound by the conditions of insurance embraced therein. The plaintiff could not be permitted to say that he did not understand the terms of the note unless his signature thereto was procured by misrepresentation or fraud or artifice. Addison on Torts, sec. 315; *Brown v. Railroad*, 18 Mo. App. 568; *Rothchild v. Frensdorf*, 21 Mo. App. 318; *Obrien v. Kinney*, 74 Mo. 125; *Ins. Co. v. Goben*, 50 Ga. 404; *Greenfield's Estate*, 14 Pa. St. 489, 496, 497.

IV. A collection and retention of the remaining instalments by the company, with a full knowledge of all the facts, would not, under the provisions of the policy and note, make it liable for a loss occurring during the default in the payment of the instalment note. The plaintiff's first instruction should have been given. *Williams v. Ins. Co.*, 19 Mich. 451; *Williams v. Ins. Co.*, 19 Mich. 469; *Wall v. Ins. Co.*, 36 N. Y. 157; *Muhleman v. Ins. Co.*, 6 W. Va. 508; *Shakey v. Ins. Co.*, 44 Iowa, 540; *Shultz v. Ins. Co.*, 42 Iowa, 239; *Neely v. Ins. Co.*, 7 Hill [N. Y.] 49; *Ware v. Ins. Co.*, 45 N. J. Law, 177; *Ins. Co. v. Klink*, 65 Mo. 78.

No brief for the respondent.

HALL, J.—Under the view entertained by us of this case it is only necessary to consider the action of the court in giving the two instructions set out in the statement of facts.

I. We shall first consider the instruction given as to the effect of the plaintiff's execution of the premium note. Ordinarily the premium note would have to be deemed a part of the contract between plaintiff and defendant, the contract consisting of the policy and the note. This is clearly established by the authorities cited by defendant's counsel.

If the plaintiff was induced by fraud or imposition

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to sign the premium note, it, of course, would form no part of the contract. But not only was there no evidence of either such fraud or imposition, but the instruction itself was based on neither such fraud nor deception. The instruction was based solely on the mistake of the plaintiff as to the character of the instrument he was signing. The question is, was such mistake on the part of the plaintiff sufficient to relieve him from the obligation imposed by the premium note as a part of the contract of insurance? The note showed on its face that it was not merely an obligation to pay so much money; the stipulations referring to the policy of insurance were printed in the body of the note in a way not to escape observation, and were plain and unambiguous; and it being signed by the plaintiff in the transaction of the business to which it related, "it was his duty to read it, and in the absence of proof of fraud, deceit, or imposition, the law presumes he had knowledge of its contents." *Snider v. Exp. Co.*, 63 Mo. 383; *O'Bryan v. Kinney*, 70 Mo. 127; *Brown v. Railroad*, 18 Mo. App. 574; *Moore v. Henry*, 18 Mo. App. 35; *Railroad v. Cleary*, 77 Mo. 637; *Rothschild v. Frensdorf*, 21 Mo. App. 323; *Taylor v. Fox*, 16 Mo. App. 527. And the plaintiff is as much bound by what he signed as if he had read it. *Robinson v. Jarvis*, 25 Mo. App. 425.

In *Biggs v. Ewart*, 51 Mo. 249, it is said: "It may be assumed as an axiom that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself; yet, if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper, and not the one he really signed, he ought not to be bound by such signature." This has been affirmed, as far as it relates to the parties themselves, in *Wright v. McPike*, 70 Mo. 175, and *Cole Bros. v. Wiedmarr*, 19 Mo. App. 14. But this principle has no application to the facts of this case. Here the writing signed was that which the party intended to sign, and here there was no agreement that

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the writing should be other than it was. In other words, the policy and the note were signed by the parties as intended, and there was no agreement outside of them; they, therefore, constituted the contract between the parties.

II. The stipulation contained in the note making the whole amount unpaid on the policy earned, due and payable in case of nonpayment of any instalment when due, except in the event of settlement by the assured "for time expired as per terms on short rates", was a part of the contract of insurance. Such stipulation was valid and binding. *Amer. Ins. Co. v. Klink*, 65 Mo. 78. Since all the unpaid instalments became due and payable on the default made on December 1, 1885, the collection by the defendant of all the unpaid instalments after the loss, which occurred during the default, with knowledge thereof, did not waive the provision of the policy exempting it from liability for a loss occurring during such default. The collection was the collection of what was due and payable, and could not constitute a waiver of any of the defendant's rights. *Williams v. Ins. Co.*, 19 Mich. 451.

The court should not have given the sixth instruction given for plaintiff, but should have given the instruction asked by defendant asserting the contrary principle.

For the reasons given the judgment is reversed and the cause remanded. All concur.

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W. W. MOORE, Respondent, v. G. G. RYAN, Appellant.

Kansas City Court of Appeals, June 13, 1888.

1. MORTGAGEOR AND MORTGAGEE—RIGHTS OF RESPECTIVELY AFTER CONDITION BROKEN.—After condition broken, the mortgagee becomes entitled to the possession of the mortgaged property. Until foreclosure, pursuant to the provisions of the mortgage, the mortgageor has an equity of redemption. But if the mortgagee shall proceed to a foreclosure, he does so for the purpose of realizing his debt, and when he has done this, it is the accomplishing of the main purpose and office of the mortgage. And where the mortgage covers several parcels of property, each parcel should be sold separately, and the moment he has realized enough to pay the debt and charges, he should stop the sale. He then becomes a trustee of the remaining property for the benefit of the mortgageor, and his refusal to surrender it is tortious, and is subject to action of replevin or trover, according to the fact.

2. REPLEVIN—DEFENCE AVAILABLE IN.—The defendant in replevin must defend upon the specific ground taken by him when demand for possession was made and the trial had.

3. MORTGAGE—FORECLOSURE OF—PURCHASE OF PROPERTY BY MORTGAGEE.—Where the mortgagee purchased at his own sale, as in this case, it left the right of the mortgageor to redeem unforeclosed. Such a sale, though not void, is voidable, at the election of the mortgageor, by paying off the mortgage debt. But if, after having knowledge of such sale and purchase by the mortgagee, the mortgageor acquiesced therein, he could not call on a court of equity to aid him in setting aside such sale.

APPEAL from Barton Circuit Court, HON. D. P. STRATTON, Judge.

Affirmed.

Statement of case by the court

This is an action of replevin for the recovery of the possession of a cow. The controversy grew out of the following state of facts: On the eighteenth of June, 1885, the plaintiff executed to defendant his chattel mortgage on the cow in question, and on a team of

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horses, to indemnify the defendant as surety for plaintiff on a certain note of that date to one C. H. Pool. The note was for one hundred and twenty-five dollars, and became due on the eighteenth day of December, 1885. The mortgage is somewhat peculiar in its provisions, viewed as one of indemnity from the principal debtor to his surety, as it is framed to justify a foreclosure by the mortgagee on the maturity of the note, without the surety having satisfied the same.

Some time before the maturity of the note, the plaintiff delivered up to the defendant the two horses, as he (plaintiff) was going out west to remain for a season, with the statement that they were thin, and the defendant could use them for the keeping, and he would be the better secured. The mortgage was not recorded. The cow was left in the plaintiff's possession, and his family continued to milk her during plaintiff's absence. While the plaintiff was thus absent, about the first of February, 1886, the defendant advertised said property for sale under said mortgage. He claims that the cow was in view on the street at the time of the sale. He first put up the horses and sold them. They were knocked off to a third party at the sum of one hundred and thirty dollars, the purchaser, in fact, bidding in the horses for the defendant. The cow was then sold, and bid in by the defendant at the sum of twenty dollars. The cow remained, as theretofore, in the possession of plaintiff's family.

The plaintiff returned home about the thirteenth of February, 1886. His evidence tended to show that when he first came home he did not know of the sale made by defendant; that defendant applied to him for some money, stating that it was needed to pay the interest on the note; that he let defendant have ten dollars, one-half of which was to pay such interest, and the other half to go to his mill account with defendant; that shortly afterwards defendant again applied to him for money, and he let him have fifteen dollars, five of which was for interest.

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Defendant, in his testimony, wholly denied this payment of interest by plaintiff, though he admitted that plaintiff promised to raise the money to redeem the property, while plaintiff claimed that he did not propose to redeem the horses, but only the cow.

The defendant did not pay off the note to Pool until in April, 1886. The cow remained in plaintiff's possession until the following June, when she had a calf out in a pasture, when defendant claimed the right to hold her, and took her into possession, and plaintiff brought this action in a justice's court. While the case was pending there, defendant sold the horses to a third party. The case was tried before the court without a jury. Verdict and judgment for plaintiff. Defendant has appealed.

THURMAN & WRAY and ROBINSON & BOWLING, for the appellant.

I. After condition in a chattel mortgage is broken, and possession of the property taken by the mortgagee, the mortgageor cannot maintain replevin unless the mortgagee has accepted payment of the debt secured by the mortgage. *Williams v. Rorer*, 7 Mo. 556; *Robertson v. Campbell*, 8 Mo. 616; *Sexton v. Monks*, 16 Mo. 156; *Lacy v. Giboney*, 36 Mo. 320; *Barnett v. Timberlake*, 57 Mo 501; *State ex rel. v. Adams*, 76 Mo. 612; *Beckham v. Tootle*, 19 Mo. App. 596; *State to use v. Carroll*, 24 Mo. App. 361; *Jackson v. Cunningham*, 28 Mo. App. 354; Jones on Chat. Mort., secs. 454, 634, 636; 4 Kent's Comm. 138.

II. The chattel mortgage read in evidence and the testimony showing that defendant had not paid the Pool note when due, placed the title to the property in question, with the right to possession in plaintiff, as shown by authorities cited above. Respondent having failed to show payment of debt, interest, "costs," "charges," and "expenses," he could not maintain an action in equity, much less at law for the recovery of this property.

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III. The first instruction given at the instance of plaintiff is clearly erroneous. The ownership and right to possession of the property was in defendant. Again there was no evidence upon which to base the instruction; the amount of interest or data from which it could be ascertained is wanting. There was no evidence of "costs," "charges," and "expenses" required to be paid by the mortgagee before applying the proceeds of sale in payment of debt and interest.

IV. The instruction number one asked by defendant should have been given.

V Upon defendant's theory the sixth instruction asked by defendant should have been given. It is clear that the intention of defendant in purchasing the property was to hold the same for plaintiff as mortgagee, and plaintiff fully recognized and ratified his act in so doing by agreeing to pay the debt, etc. After being informed by defendant what he had done, and as plaintiff testified, he paid the interest on this debt long after sale and notice of all the facts.

VI. The burden of proof to show a right of possession is on plaintiff. Wells on Replevin, sec. 697. In this plaintiff has wholly failed.

BULER & TIMMONDS, for the respondent.

I. A sale of part of the mortgaged property by virtue of a power contained in the mortgage for a sum sufficient to pay the mortgage debt with costs and expenses, extinguishes the mortgagee's title to the chattels remaining unsold and the power of sale becomes *ipso facto*, void. Jones on Chat. Mort. [2 Ed.] sec. 798; *Charter v. Stephens*, 3 Denio [N. Y.] 33.

II. In this case there was no evidence that there were any costs, charges, or expenses. Defendant himself wrote and put up the sale notices and made the sale. If he had any claim for charges, or expenses, it was his duty to so state to plaintiff and show that fact in his defence. 1 Greenl. Evid. [Redfield's Ed.] sec. 79; Starkie on Evid. [9 Ed.] s. p. 589; *Smith v. Crews*, 2

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Mo. App. 269; 3 Parsons on Contracts [6 Ed.] s. p. 244; *Boardman v. Still*, 1 Camp. 410; Wells on Replevin, sec. 381.

III. The declaration of law given by the court at the instance of the plaintiff properly ignored the question of costs, charges and expenses, because there was no evidence upon which to base a declaration embracing those items. *Matthews v. Elevator Co.*, 59 Mo. 474; *Newcomb v. Blakely*, 1 Mo. App. 289; *Russell & Co. v. Ins. Co.*, 55 Mo. 594.

IV. If it be conceded that as an abstract proposition of law the declaration should have gone further and required a finding that the sum realized on the sale of the horses was sufficient to pay costs and expenses as well as debt and interest, still in this case it is wholly immaterial, as it does cover the only question really in controversy between the parties, and the trial being before the court, the omission, if it was an omission, is at all events not a reversible error. *Stone v. Spencer*, 77 Mo. 361; *Cooper v. Ord*, 60 Mo. 431.

V. The case was tried upon the theory that the only claim that the defendant had or asserted against the mortgaged property was the debt and interest expressed in the note and that the only question in controversy was whether, after selling the horses for a sum sufficient to pay his claim, he (the mortgagee) could proceed to sell the other property not necessary for this purpose. The question in regard to costs and expenses of sale not having been raised in the trial court, it is too late for appellant to raise it now. He cannot try his case on one theory in the circuit court and another and totally different one in the appellate court. *Bettes v. Magoon*, 85 Mo. 580; *Bray v. Seligman*, 75 Mo. 31, 40.

VI. The position contended for by appellant amounts to this: That one man may execute a chattel mortgage to another on property consisting of numerous separate articles, each article of a value equal to the debt secured, and upon default and sale, the first article sold may bring more than enough to pay the entire debt

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and all expenses, yet the mortgagee may go on selling till all are sold merely for the purpose of getting the proceeds of the mortgageor's property into his hands, and then paying the money over to him. This is contrary to reason, as well as to law and justice. *Hungate v. Reynolds*, 72 Ill. 425; *Stromberg, v. Lindburg*, 25 Minn. 531; Jones on Chat. Mort., sec. 797. The construction contended for by respondent is the one generally acted upon in practice. The present form of mortgages with power of sale was, we apprehend, but little used at the time the older decisions were rendered in this state in regard to the effect of default on the ownership of the property. The one in controversy in this case constitutes a contract which, we submit, clearly means that it shall be enforced in the manner specified, if at all, and though it may not preclude any other manner of foreclosure, still, as held in *Charter v. Stevens*, 3 Denio, 33, having elected to proceed in that manner, the mortgagee is bound to go according to the obvious meaning and intent of the instrument. That case was almost precisely like the one at bar. The language of the clause authorizing sale, etc., is almost precisely the same. We submit that it ought to be the law of this case. The fact that such has been the settled practice ever since these mortgages have been in use, probably accounts for what might otherwise seem remarkable, that there has been no case involving the point presented in this case yet passed upon by the appellate courts of this state, at least, so far as we are aware. We are not contending against the doctrine of any of the authorities cited by appellant's counsel, but simply for a decision by this court which will, in effect, recognize and sanction a long and well-established construction by the business public of a most extensive and important class of contracts

PHILIPS, P. J.—I. After condition broken the defendant became entitled to the possession of the mortgaged property, as he was then the legal owner. Until

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foreclosure, pursuant to the provisions of the mortgage, the plaintiff had an equity of redemption. And while so long as the mortgagee holds the property under the forfeiture, the mortgageor cannot retake it without paying the mortgage debt, yet if the mortgagee shall proceed to a foreclosure under the provisions of the deed, he does so for the purpose of realizing his debt; and when he has thus recovered the amount of his debt, that is the accomplishing of the main purpose and office of the mortgage. These are now well-settled principles of the law of chattel mortgages.

II. It would seem to follow as a necessary corollary from these postulates, that where the mortgage covers several parcels of property, and the mortgagee proceeds to foreclose and sell, by selling each parcel separately, the moment he has realized enough to satisfy the debt and charges he should stop the sale; and his title to the residue of the mortgaged property is then extinguished. He then becomes a trustee of the remaining property for the benefit of the mortgageor; and his refusal to surrender to the mortgageor the property, not necessary to be sold to make the debt, is tortious, and would invite the action of replevin or trover, according to the fact. *Charter v. Stevens*, 3 Denio, 33; Jones Chat. Mort., sec. 798.

III. Giving the defendant the benefit of every reasonable doubt arising on the proofs, the aggregate amount of principal and interest due on the note at the time of the sale was not over $126.80. The horses were first sold, and brought one hundred and thirty dollars. This was $3.20 more than the amount of the debt. This, therefore, released the cow from the operation of the mortgage; and she then being in the possession of the mortgageor, nothing remained to be done to restore his legal title. The defendant, in order to escape the legal effect of this state of facts, contends, first, that he was entitled to have deducted from the one hundred and thirty dollars the expense of such sale. There was, however, no evidence of any expense attending the sale.

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The defendant wrote the notices of sale, and put them up in person, and he also cried the sale. At the trial he made no claim on this account, and offered no proof of any expenditure of money, or of the value of his services. It was not the duty of the plaintiff, in the first instance, in making out a *prima-facie* case, to make the defendant a voluntary offer of compensation for his voluntary services; and if the defendant had or intended to make, any such claim he should have asserted it at the trial, and tendered proof. The amount of such expenses and charges was a matter peculiarly within his knowledge, and is not presumed to be within the knowledge of the plaintiff. In such case the burden of proof rests upon the defendant. His silence at the trial, when he should have spoken, justifies the conclusion that he made no such claim. He placed his defence for witholding from plaintiff the cow upon no such claim; and upon well-settled principles of law he must defend in this form of action upon the specific ground taken by him when demand for possession was made and the trial had. Wells on Replevin, sec. 381; *Boardman v. Sill*, 1 Camp. 410.

He now insists further, that he is entitled to have his commission of two per cent. for selling the property, as provided in section 3318, Revised Statutes. Waiving any discussion of the question, as to whether this statute has any application to the instance of a mortgagee, under a chattel mortgage with power of sale, who conducts his own sale for his own benefit, what has just been said respecting the matter of other expense, is equally applicable to this. And, furthermore, if the commission of two per cent. were allowed him, it would amount to only $2.60, still leaving in his hands $1.20 after satisfying the mortgage.

IV. Though not clearly expressed, and little urged at this bar, an instruction, asked by defendant and refused by the court, suggests the idea that, after the foreclosure sale there was an agreement between the parties, by which the defendant consented that plaintiff

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might yet redeem the property, and that if he failed to do so, the verdict should be for the defendant. While not suggested by counsel, the mortgagee having purchased at his own sale, left the right of the mortgageor to redeem unforeclosed. Such a sale, though not void, is voidable at the election of the mortgageor, by paying off the mortgage debt. *Allen v. Ransom*, 44 Mo. 263; *Reddick v. Gressmore*, 49 Mo. 389. If, after having knowledge of such sale and purchase by the mortgagee, the mortgageor acquiesced therein, he could not call on a court of equity to aid him in setting aside such sale. *Medesker v. Swaney*, 45 Mo. 273. It may be conceded to defendant, that, even after the foreclosure proceedings, it was competent for the mortgagee, by parol agreement, to waive or open up the foreclosure, and reinstate the mortgage for the purpose of redemption. *Phelps v. Hendrick*, 105 Mass. 107. Such waivers presumably and ordinarily are matters for the mortgageor to insist upon, as it is alone for his benefit; whereas the mortgagee assumes in this instance the remarkable attitude of insisting that his own foreclosure was waived, and that the mortgageor is entitled to redeem. And yet at the trial he stoutly denied that any part of the money paid him by the plaintiff, after his return home, was on account of interest on the note. He cannot complain if the court should accept his evidence, in this respect, as true.

Without reviewing the evidence in detail, which, properly understood, does not sustain defendant's contention, the fact that defendant, as soon as this action was brought in the justice's court, disposed of the horses at private sale as his absolute property, without any further foreclosure sale, shows conclusively that he did not regard the first sale as abandoned, and the foreclosure reopened. He must accept the logical result of his own action, which in this case speaks louder than words.

On the merits the verdict and judgment were for the right party, and in our opinion should not be disturbed. The other judges concurring, the judgment is affirmed.

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C. R. BARNES, Respondent, v. W. W. WINN, Appellant.

Kansas City Court of Appeals, June 13, 1888.

1. PRACTICE IN APPELLATE COURTS—DUTY OF APPELLANT AS TO TRANSCRIPT, ETC.—It is the duty of the appellant to see that his transcript is made out and filed in the appellate court pursuant to the requirements of law; and he cannot excuse himself by depending upon the clerk to perform this duty. (*McCaffery v. Railroad, ante*, p. 340, *reaffirmed*.)

2. ——— PROCEEDINGS FOR AFFIRMANCE IN APPELLATE COURT—AMENDMENT OF ACT OF 1883 ON THAT SUBJECT.—The act of 1883 (Laws of Mo. 1883, p. 122) relating to the affirmance of judgments in appellate courts, is applicable to this court. This statute was not repealed by the act of 1885 (Laws of Mo. 1885, p. 216), and the courts are not remitted back to the operation of the old rule under section 3717, Revised Statutes. It was not the design of the act of 1885 to repeal the act of 1883, but only to place this court on the same basis in this particular as the Supreme Court and the St. Louis Court of Appeals, and this had already been accomplished by operation of law.

APPEAL from Jackson Circuit Court, HON. JAMES H. SLOVER, Judge.

Motion denied.

PEAK, YEAGER & BALL and R. M. EADS, for the motion.

I. This was a motion filed by the appellee to affirm the judgment in this cause for the reason that the appellant failed to file the transcript in the case on or before the twentieth day of February, 1888, and the motion is based upon a certificate of the circuit clerk as provided in the session acts of 1883. This court sustained the motion of appellee, but filed no written opinion in the cause, merely referring to the opinion in the case of *McCaffery v. Railroad, ante*, p. 340.

II. Appellant in his original brief filed in this

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cause called the attention of the court to the fact that the session acts of 1883, under which appellee's motion was filed, had been repealed by the act of 1885. Sess. Acts 1885, p. 216. And that section 3717 of the Revised Statutes, as amended by the said act of 1885, required the appellee to produce in court a transcript of the cause before he could be entitled to ask an affirmance of judgment. This court in the McCaffery case did not notice this amendment or pass upon the question raised in appellant's brief as to the sufficiency of appellee's motion for an affirmance. For this reason we ask the court to grant a rehearing in this cause, and to construe the amendment of 1885. In commenting upon the effects of an amendment of an original section, this court, in the case of *Kamerick v. Castleman*, 21 Mo. App. 590, used this language: "I understand the rule of construction in this respect to be that where a section of the statute is amended and the amendment is in such terms that it takes the place of such section, the statute in which the original section stood, as to future acts, is to be regarded as if the amended section was incorporated therein. So much so is this the rule that if by an act subsequent to the amendatory act, the section of the original statute be repealed, the amendment which stood in its stead is also thereby repealed." Applying this logic to the case at bar, it must necessarily follow that the amendment of 1883 stood upon the statute books in lieu of the original section 3717 of the Revised Statutes; and it must further follow that the amendment of 1885 as adopted, took the place of the original section 3717, as amended by the act of 1883, and that the amendment of 1885 is now and must be the only law of this state governing the matter of affirming judgments in the appellate court.

III. If this is not true, then we have the singular anomaly of two sections 3717 of the Revised Statutes, both applying to identically the same subject-matter, and one requiring the certificate of the clerk to be filed and the other requiring a transcript of the record to be

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filed before an affirmance could be asked. The absurdity of this conclusion should be sufficient to demonstrate that the amendment of 1885 is the only law in this state governing the matter of the affirmance of judgments in the court of appeals. And this reasoning is in strict harmony with the conclusions of the Supreme Court of this state in the case of *State v. Roller*, 77 Mo. 120. And moreover, the amendment of 1885 is the only statute of this state which makes section 3717 especially applicable to this court, and, therefore, this amendment should govern in this cause. We insist, therefore, that inasmuch as appellee did not file a transcript of the record in this court, he has no standing here, and has no right to ask an affirmance of the judgment.

IV. This court, in the case of *McCaffery v. Railroad*, *supra*, found from the affidavits filed in the cause that the appellant could have filed his transcript in this court prior to the twentieth day of January, 1888, and further find that said cause could have been heard at the March term of this court, and upon this state of facts they based their judgment affirming the judgment of the court below. We submit that no such facts exist in the case at bar. The affidavits show that this appeal was perfected on the twenty-fourth day of December, 1887, just one day before Christmas. The court will take judicial notice of the fact that Christmas is observed as a holiday season by the officials of this state, and will take judicial notice of the further fact that the circuit court of this county convened on the second Monday of January for the January term. These facts alone are sufficient to suggest to the court the impossibility of the clerk preparing a transcript in this cause in connection with his other duties between the twenty-fourth day of December, 1887, and the twentieth day of January, 1888. But in addition to this all the affidavits in the cause clearly show that it was a matter of impossibility for the clerk to prepare this transcript in time to be filed prior to the twentieth day of January, 1888. If the transcript could not have been filed prior to the

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twentieth day of January, 1888, then the cause could not be heard until the October term, 1888. It must follow then that the appellee has not been damaged in the slightest degree by the neglect to file the transcript at an earlier day. And even conceding that the appellant himself or his attorneys were guilty of negligence in not filing the transcript prior to the nineteenth day of February, 1888, yet the appellee has suffered no injury and no delay by reason of such negligence. Why then should such a heavy penalty be meted out to the appellant for such negligence?

On motion for rehearing.

PER CURIAM.—The judgment of the circuit court herein was affirmed because of appellant's failure to file in this court a transcript of the record from the circuit court fifteen days before the March term, 1888, to which term the cause was returnable. Appellant asks to have that judgment set aside; and insists, with much pertinacity, that he is not in fault.

The facts, substantially, are, that the judgment of the Jackson circuit court was rendered herein in November, 1887, and the appeal was perfected on the twenty-fourth day of December, 1887; and the case was ready for the transcript to be made out at once.

The appellant had from the twenty-fourth day of December, 1887, to the twentieth day of February, 1888, in which to file his transcript in this court, a period of nearly two months. It devolves upon him to make a reasonable showing to this court for this delay. The utmost that can be said in his favor is, that his attorney seems to have relied upon what he regarded as the duty of the clerk to make out the transcript without any special order from him, and forward the same here; that he was of the impression that he did direct the clerk to make out the transcript in time for the March term of this court. On the other hand, the affidavits of the

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clerk and type-writer show that in fact no such direction was given; and that had it been given the transcript would have been completed in ample time. The affidavit of the clerk states that it is the rule of the office not to make out such transcripts unless ordered by the attorney for appellant, as it is not known otherwise but that the parties may have settled the matter, or that the appellant may have abandoned his appeal. In such case should the clerk of his own motion make out the transcript he would have no claim on the appellant for his fees.

It was long since held by the Supreme Court that it is the duty of the appellant to see that his transcript is made out and filed in the appellate court. He cannot excuse himself by depending upon the clerk to perform this duty. *Caldwell v. Hawkins*, 46 Mo. 263; *Reading v. Chapman*, 46 Mo. 218. This has been the uniform holding of this court. *McCaffery v. Railroad*, *ante*, p. 340. At all events the appellant in order to have shown proper diligence should have evinced a disposition to prosecute his appeal without delay, by calling on the clerk and requesting him to make out the transcript. Instead of this, no such order was left with the clerk until about the thirtieth day of April, 1888, over four months after the appeal was taken. We fail to discover from the showing made on this motion any reason why the appellant could not have had his transcript here by the twentieth day of January, the day on which this court made its order assigning cases for hearing on the March docket. By reason of his neglect he delays the hearing of the case for one term. What we have said respecting this matter in *McCaffery v. Railroad*, *supra*, is applicable to this case.

It is further urged against the action of the court in affirming the judgment, that the respondent did not present to this court a full and complete transcript of the record as required by section 3717, Revised Statutes, as amended by the act of 1885. Laws Mo. 1885, p. 216

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By the act of 1883 (Laws Mo. 1883, p. 122) it is sufficient, as a basis for such affirmance of judgment, for the respondent to present to the appellate court the certificate of the clerk, showing the judgment, etc., as was done in this case. This act is applicable to the Kansas City Court of Appeals. *Kamerick v. Castleman*, 21 Mo. App. 120. But it is claimed that by the act of 1885, *supra*, the statute of 1883 was repealed, and that the appellate courts, in this respect, are now remitted back to the operation of the old rule under section 3717, Revised Statutes, 1879. We have held otherwise, in unreported decisions, and have treated the provisions of the act of 1883 as still in force. Our opinion has been, and is, that it was never the design of the legislature, by the amendatory act of 1885, to repeal the act of 1883. Its whole purpose was to place the Kansas City Court of Appeals on the same basis, in this particular, as the Supreme Court and the St. Louis Court of Appeals, the framer of the amendment and the legislature not being mindful at the time, that in the act organizing the Kansas City Court of Appeals, adopting the provisions of the practice act, which embraced said section 3717, Revised Statutes, the amendatory act of 1883 was by operation of law made applicable to the Kansas City Court of Appeals. The amendment of 1885, as a matter of law, was wholly unnecessary to accomplish the purpose the legislature had in view by the act of 1885.

The Supreme Court continues as heretofore, as does the St. Louis Court of Appeals, to affirm judgments on the clerk's certificate under the act of 1883. Until the Supreme Court shall hold that the act of 1885 had the effect to repeal the act of 1883, we shall regard it as in force, and applicable to the matter of affirming judgments in this court. If deemed important, we think we could present many reasons, and authorities, for the position that the effect of the act of 1885 was not to repeal by implication the act of 1883.

The motion is denied.

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THOMAS VAUGHN, Appellant, v. FRANK WILSON, THOMAS PIERPOINT, and IRA MOORE, Respondents.

Kansas City Court of Appeals, June 13, 1888.

PRACTICE—EVIDENCE—COMPETENCY OF—CASE ADJUDGED.—It would not be allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him. The same principle applies in civil cases; and evidence, in this case, of Wilson's ability to imitate Moore's signature, in no way tended to prove that Wilson had forged Moore's signature to the note in suit; and the evidence admitted was wholly irrelevant and foreign to the issue.

APPEAL from Nodaway Circuit Court, HON. CYRUS A. ANTHONY, Judge.

Reversed and remanded.

The case is stated in the opinion.

JOHN EDWARDS and WM. ELLISON, for the appellant.

I. The court should have excluded the testimony in relation to the transaction which occurred at Ira Moore's house, long after the execution of the note sued on. *Dow's Ex'r v. Spenney Ex'r*, 20 Mo. 386.

II. Where one is sued on a note he cannot escape liability by proving that any number of persons admitted that they forged his name to it. It is not admissible for one to disprove he did an act by proving that another admitted that he did it. *Young v. Smith*, 25 Mo. 341; *Clark v. Haffaker*, 26 Mo. 264; *Railroad v. Wheatley*, 49 Mo. 136.

III. In the first instruction for the defendant, the jury are told that it devolves on the plaintiff to prove to the satisfaction of the jury, by a preponderance of the evidence, that defendants signed the note. This was error. *Herrick v. Garry*, 83 Ill. 85, 89; *Brent v. Brent*,

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14 Ill. App. 256, 275, 289; *Stratton v. Railroad*, 95 Ill. 25, 32; *Monaghan v. Ins. Co.*, 53 Mich. 238; *Hall v. Wolf*, 61 Iowa, 559; *Beach v. Clark*, 51 Conn. 200; *Ruff v. Jarrett*, 94 Ill. 475. By satisfactory evidence, "is meant that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt." 1 Greenl. on Evid. [14 Ed.] sec. 2; *Whitney v. Clifford*, 57 Wis. 156. Here the jury are told that it devolves on the plaintiff not only to prove the issue by a preponderance of the evidence, but that the preponderance must be so decided as to satisfy the minds of the jury. The jury are not required to be satisfied, or to believe beyond a reasonable doubt, that the evidence preponderates in plaintiff's favor before finding for him. If they believe though they may not be satisfied of it, that the weight of the evidence is in plaintiff's favor, they should find for him. Similar phraseology has been used in instructions passed upon by our Supreme Court; but, so far as we have been able to find, no objection was made on that ground, and the point has not been passed upon.

S. B. BEECH, for the respondents.

I. The court did not err in admitting the testimony of Ira Moore, John Wilson, and Fernando Moore, relative to the practice on respondent Moore's name at his house, in March, 1886, and the case of *Dow's Ex'r v. Spenning Ex'r*, 29 Mo. 386, cited by appellant, does not militate against this position; that case says that respondents cannot show in support of their defence that "the alleged forger was a fine penman, and had great skill in imitating the handwriting of others," generally; that is, the fact that he was a good penman and a good imitator of writing, of itself would not prove him to be a forger, any more than proving a man capable of committing a burglary, would make him a burglar; but in the case at bar, the evidence shows that the co-defendant Wilson was a poor penman, and, therefore, could not be presumed to be a good imitator of signatures generally, nor of Moore's in particular, in the

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absence of practice, and under the evidence, he made the banter, or proposed to the parties at Moore's house, a trial upon Moore's name, thereby implying that he regarded himself as being skilled in the writing of that particular name, and furnishing to the jury a just and proper inference, that he had theretofore had experience in, and occasion for the writing of the name in question. If a burglary has been committed by means of a false key, and it is not only shown, that the party charged was competent to commit it (that is, a skilled locksmith), but that there was found upon him a key, or that he afterwards was able to sit down and did, from memory, make a key, that exactly fit and would open the lock of the door to the broken house, this would be proper evidence to go to the jury, as a circumstance pointing to his guilt. 1 Greenl. on Evid. [9 Ed.] secs. 51*a*, 53.

II. Appellant complains of the words, "and it devolves on the plaintiff to prove to your satisfaction," as used in the first instruction for respondents. Without qualification, these words might be objectionable, but as qualified by the words immediately succeeding, to-wit, "by a preponderance of the evidence," they are not. The jury are here clearly told that the "satisfaction" mentioned, must be measured "by the preponderance of the evidence," which is the correct rule of law, and the instruction proper under *Swigert v. Railroad*, 75 Mo. 477; *Nichols v. Winfrey*, 79 Mo. 551, where the court says: "It is sufficient in a case like this to warrant a verdict for the defendant, if it appear, satisfactorily to the jury from the whole evidence," etc., and *Clifton v. Sparks*, 25 Mo. App. 386, 387. When respondents, by answer under oath, denied the execution of the note in suit, the burden of proof was then upon the appellant. *Bank v. Snyder*, 10 Mo. App. 211.

III. The verdict was supported by the evidence and the law, and is conformable to the issue. It is certainly good as to respondents, since Wilson made no answer, as to whom it was only surplusage. *Hancock v. Buckley*, 18 Mo. App. 400; *Rembaugh v. Phipps*, 75 Mo.

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424; 73 Mo. 243. It is good so far as respondents are concerned and should not be disturbed.

IV. The court did not err in overruling plaintiff's motion for new trial.

HALL, J.—This was an action on a promissory note, which purported to have been executed by the three defendants. Wilson made no defence. Pierpoint and Moore pleaded *non est factum.* Their sole defense was that their signatures to the note were forgeries. In support of this defence the court, against the plaintiff's objection, permitted the defendants to introduce the testimony of defendant Moore and others to this effect: That in their presence, about a year and a half after the execution of the note, Frank Wilson, the other maker of the note, proposed that they all attempt to imitate the signature of Moore; that Moore wrote his name; that all of the others present on different pieces of paper attempted to imitate it; that the different attempts were compared by them, and they all decided that Wilson's was the best. This testimony, if it was of any effect at all, simply had a tendency to show that Wilson had the ability to imitate the signature of his co-maker, Moore. Was the evidence admissible for such purpose? We think not. We know of no authority in favor of the admission of evidence for such purpose, and against its admission is *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 321. The principle underlying the general rule, that "It would not be allowable to show on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him" (1 Phil. on Evid. 766), seems to apply to and to settle this question. Evidence of Wilson's ability to imitate Moore's signature in no way tended to prove that Wilson had forged Moore's signature to the note in suit. The evidence was wholly irrelevant and foreign to the issue.

For this reason the judgment is reversed and the case remanded. All concur.

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J. W. ZELIFF, Respondent, v. ADAM N. SCHUSTER *et al.*, Appellants.

Kansas City Court of Appeals, June 13, 1888.

1. FRAUDULENT CONVEYANCES—HOW FAR APPLICABLE TO CREDITORS—EVIDENCE OF INTENT.—Although the statute of frauds respecting the fraudulent transfer of property by a debtor applies to subsequent as well as existing creditors of the grantors, yet the law is, that it requires stronger evidence of a fraudulent intent on the debtor's part in the case of subsequent creditors than as to existing creditors.

2. PRACTICE—COMPETENCY OF EVIDENCE—FAILURE TO OBJECT IN TRIAL COURT.—The party who lets in evidence which is not competent in the trial court without objection, and having himself brought it before the jury and predicated an instruction upon it, cannot first complain of it here.

APPEAL from Atchison Circuit Court, HON. CYRUS A. ANTHONY, Judge.

Affirmed.

Statement of case by the court.

This is an action of interpleader in an attachment suit. The evidence showed that for a year or so prior to April, 1885, the firm of Long & Littel were engaged as partners in the mercantile business at Dotham, Atchison county. They also had a branch store at the town of Fairfax. The business at Fairfax was run by the interpleader Zeliff, as the agent of Long & Littel. The sign over the door of the Fairfax store was, "Cheap Cash Store," with the name of J. W. Zeliff underneath it.

In the month of April, 1885, Zeliff claims to have bought out the interest of Long & Littel in the Fairfax store, and that thereafter he conducted the business solely in his name, Long & Littel having no interest whatever therein. Long & Littel continued in business as theretofore, at Dotham.

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Interpleader's evidence tended to show that, at the time of this purchase by him, he had advanced funds in the business bought out by him, and that the firm, and Long individually, were owing him other moneys. In the trade, made more particularly between him and Long for the firm, these debts owing to Zeliff went in as part payment of the purchase money; and for the residue of the purchase price, Zeliff executed to Long, who was his father-in-law, two negotiable promissory notes, one for two hundred and fifty dollars, due six months after date, the other for three hundred and twenty-five dollars, due one year after date. The goods so bought invoiced at $771.74. Thereafter Zeliff, as his evidence tended to show, continued to do business, keeping separate book accounts and purchasing goods from parties and shipping the same, in his name, until he had expended about fifteen hundred or sixteen hundred dollars for additional goods, which were in the store at the time of the levy of the writ of attachment, hereinafter mentioned. His evidence tended to show other acts of a change of possession of said store and its business.

On the first-named note Zeliff paid one hundred and twenty-five dollars, and thereupon Long gave him up the note as paid. On the other note Zeliff had made no payment when the attachment was served. For debts contracted by Long & Littel, in conducting their mercantile business at Dotham, after the imputed sale of the Fairfax store to Zeliff, the plaintiffs, Adam N. Schuster *et al.*, brought suit, and sued out writs of attachment in aid thereof, and seized the stock of goods in the Fairfax store as the property of Long & Littel. This was in November, 1885. Thereupon Zeliff interpleaded in said attachment suit, claiming the goods as aforesaid. The attaching creditors claim that the reputed sale to Zeliff was only colorable and fraudulent as against the creditors of Long & Littel.

The attaching creditors' evidence tended to show that, after the reputed sale, Long & Littel bought goods from various parties for the store at Dotham. Long &

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Littel continued to make payments and preserve their credit until the fall of 1885, representing that their business was in a thriving condition. They also introduced evidence of statements made by Zeliff which indicated that he had not bought out Long & Littel at the time he claims; and there was also evidence as to statements made by Long touching the question as to whether he had negotiated the unpaid note of Zeliff, which is sufficiently noticed in the opinion. There was also some evidence tending to show that, in the summer of 1885, Long & Littel were seen about the Fairfax store, as if concerned in it; but there was no tangible proof of any sales of goods made by them, or of the exercise of control over that store by them.

There was other evidence, *pro* and *con.*, but not of sufficient importance to be stated. The jury found the issues for the interpleader.

LANCASTER, THOMAS & DOWE, for the appellants.

I. It is not necessary that a vendee shall have actual knowledge of the fraudulent intent of his vendor. If he has knowledge of facts sufficient to put a man of ordinary prudence upon inquiry as to the intent of his vendor, he is a party to the fraud and the sale is void as against the creditors of the vendor. *Rupe v. Alkire*, 77 Mo. 641; *Stern Co. v. Mason*, 16 Mo. App. 473; *Frederick v. Allgaier*, 88 Mo. 598.

II. If such knowledge comes to the vendee before the payment of the purchase price, the sale is void as against the vendor's creditors. *Dougherty v. Cooper*, 77 Mo. 528; *Arnholt v. Hartwig*, 73 Mo. 485; *Young v. Kellar*, 94 Mo. 581.

III. The giving of negotiable notes for the purchase price is not payment unless the notes are negotiated before maturity, or paid before notice of the vendor's fraudulent intent, or of facts sufficient to put the vendee upon inquiry. *Arnholt v. Hartwig*, 73 Mo. 485; *Paul v. Fulton*, 25 Mo. 163, 164; *Young v. Kellar*, 94 Mo. 581.

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IV. The levy of a writ of attachment on the property in the hands of a vendee is notice to him of the fraudulent intent of the vendor. *Dougherty v. Cooper*, 77 Mo. 528; *Arnholt v. Hartwig*, 73 Mo. 485.

V. It is error to give instructions which comment on the evidence, or single out particular facts and circumstances, and point out to the jury their weight or probative force. *Kendig v. Railroad*, 79 Mo. 207; *Shaffner v. Leahy*, 21 Mo. App. 110; *Weil v. Schwartz*, 21 Mo. App. 372.

VI. It is error to give instructions based upon a series of facts as to some of which there is no evidence. *Bank v. Overall*, 16 Mo. App. 510; *Skyles v. Bollman*, 85 Mo. 35; *Pipkin v. Haucke*, 15 Mo. App. 373.

VII. It is error to give instructions that are calculated to mislead or confuse the jury. *Donahoe v. Railroad*, 83 Mo. 560; *Chouteau v. Iron Co.*, 82 Mo. 73; *Greer v. Parke*, 85 Mo. 107.

VIII. It is error to give contradictory, conflicting, or inconsistent instructions. *Frederick v. Allgaier*, 88 Mo. 598; *Stevenson v. Hancock*, 72 Mo. 612.

IX. Where there is a total failure of evidence to support the verdict, the appellate court will reverse the judgment. *Whitsett v. Ransom*, 79 Mo. 260.

X. Section 2505, Revised Statutes, relating to change of possession of personal property, applies in favor of prior as well as subsequent creditors. *Knoop v. Distilling Co.*, 26 Mo. App. 303.

XI. The change of possession of personal property from the vendor to the vendee must be open, notorious, and unequivocal; such as will apprise the public without inquiry. *Burgert v. Borchert*, 59 Mo. 80; *Wright v. McCormick*, 67 Mo. 426; *Stern v. Henley*, 68 Mo. 262.

XII. The facts shown in this case do not constitute a change in possession, and the court should have so instructed the jury. *Wright v. McCormick, supra; Stern v. Henley, supra.*

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LEWIS & RAMSAY, for the respondent.

I. There is no evidence of Zeliff's knowledge of any facts making him party to any fraud. The evidence in the case was properly, as to the law, submitted to three juries, who found against the claim of plaintiff.

II. The notes given by Zeliff were paid as to one and the other actually negotiated before the attachment suit.

III. The complaint as to the giving of instructions for interpleader is not justified. It is like the complaint, which was not sustained, in the case of *Kendig v. Railroad*, 79 Mo. 207; see also, *Shaffner v. Leahy*, 21 Mo. App. 110; *Weil v. Schwartz*, 21 Mo. App. 282. No instructions were given for him which were calculated to mislead or confuse the jury; and there was no evidence that Zeliff had knowledge of fraud, or of facts sufficient to put him on inquiry, or that there was any fraud at all as against plaintiff.

IV. There is no conflict in the instructions on the part of plaintiff, or in all the instructions of both sides taken as a whole.

V. It is only where there is a total failure of evidence to support the verdict that the appellate court will reverse the judgment. Here all the evidence sustains the verdict.

VI. As to the law of instructions see, *Mathews v. Elevator Co.*, 59 Mo. 474; *Karle v. Railroad*, 55 Mo. 476; *Whalen v. Railroad*, 60 Mo. 323; *Ins. Co. v. Hurck*, 83 Mo. 21.

VII. As to the law concerning change of possession, we agree to what is said, but the evidence shows a compliance with all requirements in letter and spirit.

PHILIPS, P. J.—The instructions in this case are unusually numerous, presenting every possible phase of the questions which ordinarily arise in such trials. The appellants asked twelve, and the court gave ten of them.

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One of the two refused was in the nature of a demurrer to the evidence; and everything valuable in the other was embraced in other declarations of law given. When the proper view of the facts is taken in this case, it will at once become apparent that the appellants had the benefit of issues and propositions of law much more favorable to them than the law warrants.

I. It may be conceded to appellants that the statute of frauds respecting the fraudulent transfer of property by a debtor applies to subsequent as well as existing creditors of the grantor. *Harmon v. Morris*, 28 Mo. App. 326; *Knoop v. Dist. Co.*, 26 Mo. App. 303. Yet the law is, that it requires stronger evidence of a fraudulent intent on the part of a debtor in the case of subsequent creditors than as to existing creditors. *Zeikel v. Douglass*, 88 Mo. 382. The debts in question here were contracted subsequent to the debt of the sale as claimed by respondent. That sale, as between the vendors and the vendee, was good. To avoid it, it devolved on the attaching creditors to show two facts, first, that it was intended on the part of the debtors to defraud subsequent creditors, and second, that Zeliff had knowledge of that fact, or participated in such fraudulent design, or that he had not paid the whole of the purchase money when the attachment was brought, or that the negotiable note given by him had then been negotiated.

II. This case manifestly was tried on the same theory as if the debts in question were existing at the time of the alleged purchase by Zeliff. Had it been tried on the proper theory, it is difficult to discover from the evidence in this record any fact that would have warranted a jury in finding, even against Long & Littel, that at the time of the sale to Zeliff they had it in contemplation to defraud any future creditor. There was no proof tending to show that at the time they were insolvent. They continued in business thereafter, paying their debts contracted for the purchase of goods in the usual course of trade. There was no substantial evidence showing

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that they had obtained any fictitious credit upon the faith of any representations made by them that they owned the Fairfax store. These very attaching creditors, with as favorable opportunity as Zeliff had, discovered nothing in the conduct of Long & Littel indicating embarrassment, at the time of the reputed sale, for they continued to deal with them on a credit basis. What evidence is there in this record which would justify any jury in finding that at the time of Zeliff's purchase, he had any knowledge of any fraudulent intent on the part of his vendors? It would be the merest speculation and conjecture to indulge such a suspicion. While fraud, from its very character and habits, is difficult of direct proof, and a wide range of evidence and circumstances is indulged in its investigation, yet the court ought not to throw the reins loose upon the course of examination, and permit property rights to be destroyed upon mere suspicion and unreasonable inference.

III. Viewing this case as we do under the evidence, there were really but three issues of fact for the jury to find: first, did Zeliff make the purchase of the goods in question from Long & Littel on or about the time claimed by him? second, did Long & Littel make said sale with intent to hinder or delay their subsequent creditors? and if so, did Zeliff at the time of his purchase have knowledge of such fraudulent intent? or did he acquire such knowledge prior to the payment of the purchase money, or prior to the negotiation of the note or notes given by him for the purchase price of the goods, provided such note or notes had been negotiated at all?

One thing is clear, from the instructions given by the court the jury must have found that Zeliff did make the purchase of the goods as testified to by him; and that all of the purchase money was paid by him before the goods were attached, save a note of three hundred and twenty-five dollars, given by him to Long. As to the second proposition, that issue was fully and clearly submitted by the instructions to the jury, both on the

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part of the interpleader and the attaching creditors. Their verdict is conclusive on this court.

But as to the third proposition, although appellants concede that issue was properly submitted to the jury by the instructions, they contend there was no evidence before the jury from which they could infer that the three hundred and twenty-five dollar note had been negotiated at the time of the attachment; that the only semblance of evidence bearing on this issue was certain evidence introduced at the trial as to what Long had stated on the witness-stand at a former trial herein in a justice's court. Appellants are, however, in no condition to make such objection here. In the first place, Zeliff was permitted in his redirect examination to testify that Long stated he had negotiated the note, and appellants made no objection and saved no exception. Then, on their part, they introduced witness after witness who testified to what Long testified before the justice of the peace respecting this negotiation of the note. Then in rebuttal, the interpleader introduced witnesses who testified that Long did state that he had transferred the note. To this appellants made no objection. Then in the fourth instruction, asked by appellants and given by the court, the jury were distinctly told to take into consideration "the acts, conduct, and statements of said Long & Littel or either of them, both before and after said pretended sale." The statements and declarations of Long, made after the sale to Zeliff, were not competent as against his vendee. *Weinrich v. Porter*, 47 Mo. 293. But the party who lets in such evidence, without objection, cannot first complain of it here. *Schooler v. Schooler*, 18 Mo. App. 79. And certainly he cannot complain of it after having himself brought it before the jury, and predicated an instruction upon it. The presumption in such case is to be indulged, that but for the course encouraged by the complaining party the other party would have offered other and competent evidence of the disputed fact. *Walker v. Owens*, 79 Mo. 567, 568.

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IV. We discover no such contradiction in the instructions as suggested by appellants. It is enough to say of the criticism, that some of the instructions singled out unduly particular facts in evidence, that the course pursued by the trial court was quite in harmony with the holding in *Zimmerman v. Railroad*, 71 Mo. 491; and *Nicholson v. Golden*, 27 Mo. App. 133, 154.

V. Three juries have now returned verdicts in this case in favor of the interpleader; and, if properly instructed by the court, we see no reason to suppose that a different result would follow on further trial. The appellants got all the law, and more than they were entitled to, on the last trial; and they should be content.

The other judges concurring, the judgment of the circuit court is affirmed.

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RICHARD A. LOVE *et al.*, Respondents, v. JOHN H. OWENS *et al.*, Appellants.

Kansas City Court of Appeals, June 13, 1888.

1. REAL ESTATE BROKER — COMMISSIONS — WHAT NECESSARY TO ENTITLE TO.—In order to entitle a real estate broker to commissions, for the sale of property intrusted to him, he must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on. Then he will be entitled to them, although the vendor should refuse to go on and perfect the sale; or the vendee should so refuse, if the sale is by a valid and binding contract between vendor and vendee, without any fault on the part of the vendor.

2. ——— ——— CUSTOM AMONG BROKERS AS TO AN ABANDONED SALE —CASE ADJUDGED.—Even if such a custom, as that the broker would not claim commissions in the case of a sale which failed from no fault of the seller, would constitute a defence in such a case as this, the evidence failed to establish any such custom here.

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APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Affirmed.

Statement of case by the court.

This is an action to recover a broker's commission for selling land. The contract of employment is as follows:

"Independence, Mo., February 3, 1887.

"We hereby appoint Love & Lobb my agents to sell or trade the following property, to-wit (description of property): All of the Pendleton tract in Independence, Mo., at and for the sum of $42,500; and I agree to give my said agents 2½ per cent. commission cash, on the sale thereof.

"Terms: $12,000 cash. W. H. COLVERT.
"J. H. OWENS."

The plaintiffs procured such purchaser in the person of John B. Stone, who was brought by plaintiffs to defendants, and a contract was accordingly entered into, in writing, between defendants and Stone, whereby defendants sold the property to Stone at the price of forty-two thousand, five hundred dollars, of which twelve thousand dollars was to be paid in cash, that is, one thousand dollars to be paid at signing of contract and eleven thousand dollars when deed to said property was delivered on satisfactory evidence of title; and the balance to be paid as follows: eight thousand dollars in one year, with interest at the rate of eight per cent. and the purchaser to assume the payment of three notes amounting to twenty-two thousand dollars, then a lien on said property.

The evidence showed that defendants were ready and willing to complete said contract of sale at all times, but the said Stone had refused or failed to keep the same, further than to make the cash payment of one

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thousand dollars, which defendants received, and yet hold. The evidence also showed that said Stone was solvent and able to perform said contract, and that defendants never took any steps to compel Stone to perform the whole of the contract on his part; and that before the trial of this cause below the defendants had conveyed the property to other parties.

There was some evidence in the case by which defendants sought to show that there was a custom among real estate agents in Kansas City to the effect that where the sale fell through without any fault on the part of the seller no commissions were expected by the agent. This is sufficiently noticed in the opinion of the court.

The case was submitted to the court without the intervention of a jury and the following finding of facts and declaration of law sufficiently indicate the theory on which the court tried the case:

"The court finds the facts in this case to be that defendants agreed with plaintiffs by the contract read in evidence that if the plaintiffs would procure a purchaser for the real estate described in the petition; that for such services the defendants would pay two and one-half per cent. of the selling price. Plaintiffs by their own efforts did secure the purchaser John B. Stone, who entered into the contract which defendants read in evidence, for the purchase of said real estate defendants were ready and willing to make their deeds to said real estate to said Stone, but said Stone, without any reasonable cause or excuse, and without the fault of defendants, and after having made said contract, did refuse to carry out the same and refused to pay the balance of the purchase money, but violated his contract and declared the same off. Defendants have retained and still have the one thousand dollars cash paid by said Stone and hold the same as forfeited. Stone was all the time and is now fully able to answer in damages for violation of said contract, and besides defendants have ample remedy for specific performance as against said purchaser Stone.

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The plaintiffs sold the real estate for forty-two thousand, five hundred dollars, and they are entitled to recover their two and one-half per cent. on this sum, to-wit, $1,062.50, with six per cent. interest from the institution of this suit."

The court found the issues for plaintiffs. From this judgment defendants have appealed.

Daniel B. Holmes and Botsford & Williams, for the appellants.

I. By the written contract between plaintiffs and defendants, plaintiffs only became entitled to their commissions when they sold or traded defendants' property on the terms therein mentioned, to a person ready, able, and willing to purchase said property on said terms. Plaintiffs having failed to sell said property on these terms, agreed upon between themselves and defendants, are not entitled to their commissions, and the court erred in refusing the instruction asked by defendants, that, on the pleading and evidence, the finding and judgment should be for defendants. *Reiger v. Bigger*, 29 Mo. App. 421; *McArthur v. Slauson*, 53 Wis. 41.

II. The execution of the written contract for the sale of said property by appellants to the person produced by respondents for the purchase thereof on the terms contained in said written contract, and the acceptance by appellants of the one thousand dollars cash paid thereon did not operate as an acceptance by appellants of such contract, and payment as performance, or as a waiver of performance by respondents of their agreement to sell said property on the terms of twelve thousand dollars cash payment thereon. *Reiger v. Bigger*, *supra*.

III. The engagement of respondents, under their written contract of employment by appellants, as their agents, was to sell or trade the property of appellants, and respondents were only entitled to commissions as

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such agents on an actual sale thereof on the terms proposed in their contract of employment. They must produce a person who not only enters into an agreement to purchase on the terms mentioned in said contract of employment but who actually purchases, by complying with the terms of such agreement, or who is ready, able, and willing to consummate the agreement by complying with its terms on his part. And, as such person so produced by respondents, without the fault of appellants, failed and refused to take the property, pay the amount of the purchase money mentioned in said contract of employment, and execute the securities agreed upon in the contract for the purchase and sale of said property, appellants being always ready, able, and willing to complete the agreement, on their part, on such compliance by the person so produced by respondents, respondents have failed to comply with the terms of their employment by appellants, and the judgment in their favor should be reversed. *Hayden v. Grillo*, 26 Mo. App. 289, and cases cited; *Reiger v. Bigger*, 29 Mo. App. 421; *Budd v. Zoller*, 52 Mo. 238; *McGavock v. Woodlief*, 20 How. [U. S.] 221; *Richards v. Jackson*, 31 Md. 250; *Kimberly v. Henderson*, 20 Md. 512. The case last cited has been approved by the Supreme Court of Missouri, in *Woods v. Stephens*, 46 Mo. 55, and the Kansas City Court of Appeals in *Reiger v. Bigger, supra. Hyans v. Miller*, 71 Ga. 698; *Hinds v. Henry*, 26 N. J. Law, 328; *Kerfoote v. Steele*, 113 Ill. 610.

IV. Proof having been made of a general custom among real estate dealers that commissions are not claimed or paid by the seller where the purchaser refuses to carry out the contract, without the fault of the seller, such custom entered into the contract between plaintiffs and defendants, and defendants' instruction to that effect should have been given. *Hinds v. Henry, supra; Kock v. Emmerling*, 22 How. [U. S.] 69.

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GATES & WALLACE and J. MACK PEACOCK, for the respondents.

I. If a real estate agent has authority to sell for "cash," an agreement procured by him, in which it is provided that the "cash" shall be paid on a delivery of a deed to the property, is in substantial conformity with the agent's authority to sell. *Smith v. Allen*, 86 Mo. 178, 190; *Gross v. Brown*, 31 Minn. 484. There is, therefore, no difference in this respect between the expression "Terms, $12,000 cash" in the defendants' contract with plaintiffs, of February 3, 1887, and the contract defendants made with the purchaser Stone, the next day, February 4, in which they acknowledge the receipt of one thousand dollars, and state that, "eleven thousand dollars cash upon the delivery of warranty deed."

II. If an agent procures a purchaser who is ready, able and willing to enter into a contract to take the property on the terms on which the agent is authorized to sell the same and the principal himself modifies or changes the terms, the agent is entitled in a suit on his contract to recover his commissions. *Woods v. Stephens*, 46 Mo. 555; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Nessbitt v. Hellser*, 49 Mo. 383. We claim that there is no difference between the terms on which the plaintiffs, Love and Lobb, were authorized to sell defendants' property, and the contract of sale entered into by defendants and the purchaser Stone; but even if there is any difference, it clearly appears that the contract of sale, as executed, was in accordance with the terms desired and required by the defendants, Owens and Colvert, and with the assistance of their attorney; and the closing of the contract was postponed from February 3, to February 4, and from Independence to Kansas City, for the purpose of allowing defendants to consult their attorney.

III. A real estate agent has earned his commissions, and is entitled to recover them when he has procured a purchaser who enters into a written contract

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with the owner to purchase the property, provided the financial condition of the purchaser is such that the contract con be enforced by the owner against him, even although the purchaser refuses, after he has executed the contract, to take the property. *Collins v. Fowler*, 8 Mo. App. 588; *Love v. Miller*, 53 Ind. 294; *Rice v. Mayo*, 107 Mass. 550; *Veazie v. Parker*, 72 Me. 443; *Leete v. Norton*, 43 Conn. 219; *Gross v. Broom*, 31 Minn. 484; *Gross v. Stevens*, 32 Minn. 472; *Coleman's Ex'r v. Meade*, 13 Bush (Ky.) 358; *Keys v. Johnson*, 68 Pa. St. 42; *Reynolds v. Tomkins*, 23 W. Va. 229, 235; *Potvin v. Curran*, 13 Neb. 303; *Finnerty v. Fritz*, 5 Col. 174; *Watson v. Brooks*, 8 Sawyer (U. S. C. C.) 316; *Simonson v. Kissick*, 4 Daly (N. Y.) 143; *Duclose v. Cunningham*, 102 N. Y. 678; *Middleton v. Findla*, 25 Cal. 79; *Gonzales v. Brood*, 57 Cal. 224; *McGrary v. Green*, 38 Mich. 172; *Sheppard v. Hedden*, 5 Dutch. (N. J. Law) 345; *Harris v. Begner*, 9 Phil. 51; Fitch on Real Estate Agency, 123; Wharton on Agency, sec. 328; *Bailey v. Chapman*, 41 Mo. 538; *Carpenter v. Rynders*, 52 Mo. 281. This rule is also recognized in Illinois and New Jersey in the two cases cited by defendants. *Kerfoot v. Steele*, 113 Ill. 610; *Hinds v. Henry*, 36 N. J. Law, 328.

IV. A written contract for the purchase of land, binding both vendor and purchaser, is a sale within the meaning of an agreement to pay a commission to a broker upon sale of the land. It is not necessary that a deed shall have been executed and delivered. *Rice v. Mayo*, 107 Mass. 550; *Chapin v. Bridges*, 116 Mass. 105.

V. In order that a usage or custom may become a law of trade and be obligatory upon those contracting, in reference to matters to which it relates, it must be shown to be certain, uniform, reasonable and so generally known and of such long existence that the parties must be presumed to have known of, and contracted with reference to it, or it must be shown that the parties actually knew of its existence. Clarke's Brown on Usages

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and Customs, 158; *Martin v. Hall*, 26 Mo. 386; *Walsh v. Transp. Co.*, 52 Mo. 434; *Ober v. Carson*, 62 Mo. 290; *Cooke v. Fiske*, 12 Gray, 491.

VI. A usage or custom is not admissible to contradict or vary the terms or the legal import of a contract or a settled rule of law. It cannot make the rights and liabilities of the parties to a contract other than they are at law. Clarke's Brown on Usages and Customs, 82; *Ober v. Carson*, 62 Mo. 214; *Cotton Press Co. v. Stanard*, 44 Mo. 71. Here the express agreement was to pay a commission on a sale of the property. If the law determined what constitutes a performance of the service by the broker, so as to entitle him to his commissions, then the custom, if one existed, cannot have any effect.

PHILIPS, P. J.—The principal contention of appellants is, that notwithstanding the agent may procure a purchaser, ready and willing to enter into a contract to take the property on the terms proposed, or such as is agreeable to the seller, and the agent bring the seller and the purchaser together, who then enter into a written contract, executed by them, as in this case, yet if the purchaser afterward fail to come up and perform the contract, without any fault on the part of the seller, then the agent is not entitled to his commission, although the purchaser be perfectly solvent and able to perform.

As this position was contrary to our understanding of the rule in this jurisdiction, we have examined with much interest the authorities cited by counsel in support of his contention. The case of *Budd v. Zoller*, 52 Mo. 238, does not go so far. It was merely held, that where B proposed to A to effect for him a loan of money, to be secured by a deed of trust on A's land, for a certain commission; and at the time A delivered to B his title papers for his examination, B was not entitled to his commission where the lender produced by him refused to make the loan on account of defect in A's

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title deeds. The majority of the court held, that under the circumstances it was the duty of the broker first to have satisfied himself by an examination of the papers turned over to him by A of the sufficiency of the title. But the court were all agreed, that if A had employed B to effect a loan for him, to be secured by deed of trust on A's land, without more, and after B had produced the party ready to make the loan, and the contract had fallen through on account of defects in A's title, the agent would have been entitled to his commission, as he had done all his employment contemplated.

In *Carpenter v. Rynders*, 52 Mo. 281, the court say: "The plaintiff (the agent) had undertaken to sell defendant's lot for a commission; he negotiated a sale, which was satisfactory to the defendant. The defendant must of necessity make the deed and convey the lot." Although the failure there resulted from the default of the seller in making the deed, yet the language of the court indicates what is meant by a sale, in such connection. It is the contract negotiated by the agent; the deed to be made by the seller, of course, as that is a matter over which the agent has no control.

The case of *McGavock v. Woodlief*, 20 How. (U. S.) 221, fails to sustain appellants. The negotiation fell through because the purchaser, produced by the agent, offered certain substitution of securities, which were not acceptable to the vendor. The seller did not, as here, accept the proposition of the buyer, and enter into a written contract, satisfactory to all concerned. And the opinion of Mr. Justice Nelson concludes with the distinct announcement, that, "The broker must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on, before he is entitled to his commissions. Then will he be entitled to them, though the vendor refuse to go on and perfect the sale."

The cases of *Kimberly v. Henderson*, 29 Md. 512, and *Richards v. Jackson*, 31 Md. 252, assert the broad

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proposition, that it is not sufficient for the agent to procure a purchaser who should enter into an agreement to purchase, but he must actually purchase, by complying with terms agreed upon, unless his failure to do so is occasioned by the fault of the vendor.

So far as we are able to discover, the Maryland cases stand alone, if their holding is to apply to the facts of this case. The prevalent rule is, that where the broker, pursuant to his employment, produces a purchaser who is willing and ready to take the property on the terms acceptable to the seller, and the seller enters into a written contract with him expressing the terms of the sale, and the seller is solvent and able to perform, the broker then becomes entitled to his commission, although the vendee afterward refuses to perform, without any fault on the part of the vendor. *Love v. Miller*, 53 Ind. 294; *Rice v. Mayo*, 107 Mass. 550; *Veazie v. Parker*, 72 Me. 443; *Goss v. Stevens*, 32 Minn. 472; *Coleman v. Meade*, 13 Bush [Ky.] 358; *Keyes v. Johnson*, 68 Pa. St. 42; *Duclose v. Kissick*, 102 N. Y. 678; *Knapp v. Wallace*, 41 N. Y. 477; *Gonzales v. Brood*, 57 Cal. 224; *McCrary v. Green*, 38 Mich. 184, 185; *Sheperd v. Hedden*, 5 Dutch. [N. J. L.] 345; *Kerfoot v. Steele*, 113 Ill. 610.

This was directly held in *Collins v. Fowler*, 8 Mo. App. 588. And the language of our courts has been that whenever the agent procures a purchaser ready, willing, and able, and he is accepted by the vendor, the agent is entitled to his reward. *Nesbit v. Helser*, 49 Mo. 383, 385; *Woods v. Stephens*, 46 Mo. 556, 557; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Hayden v. Grillo*, 26 Mo. App. 293.

In this case, the agents did procure the purchaser, who was willing to take the property on the terms acceptable to the vendors. The purchaser, when presented by the broker, was accepted by the vendors, and they entered into a written contract with him at the price agreed upon between the principal and broker. It is conceded that Stone was solvent, and that he could

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have been made, by resort to the courts, to perform the contract. What more could the agent do?

The defendants, by accepting the purchaser and entering into a written contract with him, put it out of the power of the agents to bring action against Stone on the contract, as they might have done had the contract been made in their name. As the agents could not make the deed, there was nothing more they could do. It does seem to me that it would be an unreasonable construction of the contract between the plaintiffs and defendants to hold that it was the intendment that the agents to be entitled to their commission should go a step farther, and have the purchaser perform the written contract, to which plaintiffs are not parties, and over which they have no control.

The defendants not only accepted the purchaser, but received one thousand dollars of the purchase money; which they yet hold as forfeited under the contract; and also held a contract for the residue of the purchase money, which they could have specifically enforced. To permit the seller to escape his liability to the agent, merely because he is willing to let the purchaser go rather than bring a suit on the valid contract, would be to encourage injustice and open up the way for the purchaser and vendor to get off, merely by the one failing to comply voluntarily with his written compact, and the other to enforce it, the one forfeiting merely his first payment, and the other pocketing it, leaving the agent without redress for the wrong done him.

II. There was evidence offered at the trial by appellants for the purpose of establishing the existence of a custom among real estate agents in and about Kansas City not to expect or demand anycommission where the purchaser failed to come up to his contract. It is unnecessary in this case to recur to the rules of law requisite to the establishment of such custom *in pais*. A careful reading of the evidence offered in this case satisfies us that the trial court properly disregarded this

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issue. It failed to establish any such custom. The state of case in the minds of the witnesses was manifestly not such as the one at bar; and the fact that one person would say that the owner of property, rather than insist upon the performance of a valid contract with a solvent vendee, would let the contract go, could hardly tend to establish the existence of a custom that would destroy the agent's claim for commission under circumstances like these disclosed in this record.

The other judges concurring, the judgment of the circuit court is affirmed.

TRADERS' BANK, Appellant, v. M. J. PAYNE, Respondent.

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Kansas City Court of Appeals, June 13, 1888.

1. CONTRACT—PLEADINGS UPON—LAW GOVERNING—CASE ADJUDGED. The action here is founded in contract, and not on a *quantum meruit.* The petition sets out that the work was authorized by an ordinance of Kansas City, and that Comstock & Halsey were the contractors thereunder and did the work and received the tax bills therefor from the city engineer, and plaintiff holds the bills by assignment. The action is subject to the legal incidents of one founded on a special contract, except in so far as the city charter may otherwise permit. And where the petition counts on the contract (as in this case), no recovery can be had on a *quantum meruit.*

2. ——— CHARTER OF KANSAS CITY—CONSTRUCTION OF SECTION FOUR, ARTICLE EIGHT, THEREOF—CASE ADJUDGED.—The *proviso* in section four, of article eight, of the charter of Kansas City, to the effect "that nothing in this section shall be so construed as to prevent any defendant from pleading in reduction of the bill any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner," is a reservation, a beneficial provision, for the protection of the taxpayer, who may or may not interpose such defence. But he may plead the general issue, or its equivalent, going to the very foundation of the plaintiff's cause of action, and designed wholly to defeat it, and in such event the case would stand on the contract, and not on a *quantum meruit.* The special defence pleaded here does not come within the terms or meaning of this *proviso.*

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3. ——— ——— CASE ADJUDGED.—The court upon consideration of the ordinance contract, and upon review of the evidence as to the character of the work done under it, is of opinion that the contract in this case was not substantially complied with; and that the instructions given by the court properly presented the real issue to the jury, and that the verdict is sustained by the evidence. (*Creamer v. Bates*, 49 Mo. 554, *distinguished*).

APPEAL from Jackson Circuit Court, HON. JAMES H. SLOVER, Judge.

Affirmed.

Statement of case by the court.

This is an action to recover on several tax bills issued by the engineer of the City of Kansas to Comstock & Halsey, as contractors, for the paving of Broadway, a street on said city, from Third street south to the city limits. The plaintiff sues as assignee under Comstock & Halsey.

The special defence alleges that defendant "did not substantially or at all comply with said contract with the city for the doing of said work in this, that by the terms of said contract the concrete under the blocks was to be of the depth or thickness of nine inches, but defendant says that said concrete foundation, as laid by said contractors under their said contract, was laid only to the thickness or depth of six inches."

On the admission that the tax bills made out a *prima-facie* case for the plaintiff, it objected to the introduction of any evidence by defendant in support of the special defence. This was overruled.

The ordinance authorizing the improvement, and the contract under which Comstock & Halsey did the work, were read in evidence by defendant. So much of this contract as is pertinent to this controversy is as follows:

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"SUB-GRADE AND FOUNDATIONS.

"The surface of the roadway within the limits above specified to be excavated to sub-grade, which will be seventeen inches below, and parallel to the established grade and finished surface and cross-section of the street, as shown on plans or above indicated.

"On this sub-grade will be placed a layer of hydraulic cement concrete not less than nine (9) inches thick, formed as hereinafter provided, and a layer one inch thick of clean Kaw river sand spread thereon, and wetted down with sprinkling hose.

"In any case where the excavation may be made below said sub-grade, no back filling of clay will be allowed, but the extra depth must be made with concrete which will not be measured or paid for.

"CONCRETE.

"Concrete to be composed of five parts, by measure, of broken stone to two parts, by measure, of sand to one part, by measure, of hydraulic cement.

"The stone to be of hard ledge limestone, broken to pass at their greatest dimensions through a ring of two and one-half inches in diameter. They shall be screened, if necessary in the opinion of the city engineer, to secure the stones being free from fine parcels of dirt or stone, and shall be thoroughly washed with hose, and wetted before being used.

"Cement to be fresh ground, to be tested and accepted by the city engineer before being used in the work. Condemned cement to be immediately removed from the work. Cement will be required to stand a tensil strain of thirty-five pounds per square inch twenty-four hours after mixing. Contractor to provide dry storage for cement, and any barrels damaged to be thrown out.

"The concrete to be mixed in suitable wooden boxes

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of such size as the city engineer may direct. The concrete shall be formed by first thoroughly mixing the sand and cement dry in proper proportions; water to be then added in sufficient quantity only to give the mortar a proper consistency. The stones (which are to be wet) and the mortar, to be then thoroughly and rapidly mixed together in the box with shovels, and the mass turned over until every stone is completely covered with mortar.

"The concrete to be then quickly carried to its proper place, either on shovels or in wheelbarrows, boxes, or other suitable manner, and deposited in mass without scattering. In no case will it be thrown off shovels. Concrete in place to be rammed until mortar flushes to surface. No concrete to be used after it has begun to set.

"The finished surface of the concrete to conform as near as may be practicable to a line parallel to, and eight (8) inches below the true finished grade and cross-station of the street, and any guideboards which the city engineer may direct shall be furnished by the contractor, and used for this purpose.

"The edges of each fresh section of concrete to be stepped back at least two feet to furnish a bond with the next section.

"Care to be taken not to disturb the concrete until it is thoroughly set, and any precautions which the city engineer may deem necessary to prevent damage or injury shall be taken by the contractor at his own expense. No concrete shall be laid when the temperature is below 35 F. After the concrete has, in the opinion of the city engineer, become sufficiently set, and not until that time, the contractor shall begin laying the blocks thereon. Concrete to extend close up to, and around all openings, projections, or irregularities in such manner as the city engineer may direct for the purpose of securing close contact, and preventing water getting underneath.

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"The surface of the concrete to be kept wet by hose if required, until covered with full depth of sand."

The defendant's evidence showed clearly that the concrete foundation on this street did not average over six and three-fourths inches, and in no place examined did it exceed seven inches, and running as low as six inches. This examination extended from Third street north to the limits of the city, covering some eighteen blocks or more. The evidence, however, did not show that this examination was made between Eighth and Ninth streets, and there was some doubt as to whether it was made between Seventh and Eighth streets. But over the rest of the street the examination was made at intervals, on either side, of thirty-five to fifty feet by digging down to the bottom of the concrete and measuring to the top.

The contractors were not introduced as witnesses by the plaintiff.

The plaintiff introduced as a witness the city engineer, who testified that cement would shrink more or less after being laid, depending somewhat upon the moisture of the ground and other conditions; but his testimony failed to explain the discrepancy of three inches or more of such shrinkage. In rebuttal defendant's expert testimony tended to contradict this theory of the engineer. Plaintiff also sought to show that the work done in this instance was good, and the pavement was as good as any in the city.

On this state of the proofs the defendant asked and the court gave the following declaration of law:

"If the jury believe from the evidence, that the average depth or thickness of the concrete under the pavement, for the construction of which the tax bills sued on were issued, was not substantially nine inches as required by the contract, then such tax bills, and each of them, are void, and the jury cannot find for the plaintiff in any sum whatever, but must find for the defendant on all the counts of the petition."

The plaintiff asked the following instructions

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"1. Upon the pleadings and the testimony the jury will find the issues for the plaintiff on each count for the amount claimed, with fifteen per cent. interest per annum from the dates of the tax bills."

"2. The court instructs the jury that, although they may believe from the testimony that all the details of the contract, upon the completion of which the tax bills were issued, were not carried out, yet, if they further believe from the testimony that the variance from the contract was not material nor substantial, and that the pavement actually laid, and for which said bills were issued, was as durable as if all the details on the contract had been strictly complied with, then they will find for the plaintiff on each count for the amount of the tax bill therein described, with fifteen per cent. per annum interest from the date of the tax bill."

"3. If the jury believe from the evidence that the contract upon which the tax bills in suit are founded, was substantially complied with, then their finding will be for the plaintiff upon each count therein claimed with fifteen per cent. per annum interest from the date of the tax bill."

The court refused the first and second, and gave the third.

Verdict and judgment for defendant. Plaintiff appealed.

JOHNSON & LUCAS, for the appellant.

I. The answer of defendant is framed to avoid the provisions of article eight, section four, of the charter of Kansas City. Laws of Mo., 1875, p. 252. But defendant, not having tendered or pleaded any tender of the value of the work done, provided by said section, is not entitled to make the defence. There is no question in this case of the completion of the work, as in *Meyer v. Wright*, 19 Mo. App. 283, and no testimony to support the special defence was admissible.

II. (*a*) It was not shown that there was less than nine inches of concrete in front of defendant's lots; and the tax bills were *prima-facie* evidence of the furnishing

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of the material doing the work, and of the liability of the property therefor. Bad work at other places on the street does not constitute a defence for this defendant. *Creamer v. Bates*, 49 Mo. 523; *Eyerman v. Zeppenfield*, 6 Mo. App. 581. (*b*) As a further bar to the maintenance of this defence, section four of the charter (Acts 1875, p. 252) provides that "no suit on any bill shall be defeated or affected by any irregularity affecting only other bills, or matter rendering any other bill invalid, in whole or in part." In the case of *Meyer v. Wright*, *supra*, there was a failure to complete the work in front of the defendant's property.

III. (*a*) The instruction given for the defendant was erroneous. What had the "average depth" of the concrete to do with the liability of defendant's lots? A total absence of concrete, under pavement a mile away, might defeat the bills under this instruction, and yet defendant's lots would get the full benefit of the improvement. This is not the law. *Miller v. Anheuser*, 2 Mo. App. 168. The case of *St. Louis v. Clemens*, was one where there was a failure to do any work for a long distance upon the street. It has no application to a case of failure to carry out certain details. (*b*) There was not only no testimony tending to show that the fact that there was not "substantially nine inches" of concrete laid under the pavement, materially violated the contract, or made the improvement less valuable, but there was testimony that it was as durable as if it had had precisely nine inches of concrete under it. (*c*) The failure to comply fully with one specification in a contract, cannot be held to avoid the entire contract as a matter of law, and yet that is what the jury were told.

IV. The second instruction asked by defendant declared the law correctly, and should have been given. Any other theory would permit property-holders to get all the substantial benefits of the improvement contracted for without paying therefor, which is repugnant to both law and justice.

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GAGE, LADD & SMALL, for the respondent.

I. There was no error in refusing the plaintiff's instruction complained of, because the court gave its instruction which was substantially the same thing, except that it was more favorable for the plaintiff than the one refused.

II. The instruction given for defendant was unobjectionable. There being no dispute about the provisions of the contract, it was for the court to determine what provisions were material and must be substantially complied with to entitle the plaintiff to a verdict. That these provisions, as to the concrete foundation, were material, in fact the most material provisions, is beyond dispute. If, therefore, they were not substantially complied with, the tax bills were void. *Meyer v. Wright*, 19 Mo. App. 283. The above case expressly decides that "the contractor, or his assignee, cannot maintain an action on a tax bill until he has complied, at least substantially, with his contract"; and "that the contractor, for grading or paving, has no special privilege conferred upon him by the provisions of the charter of Kansas City," cited by appellant in this case and also by appellant in that case, "not common to contractors in any other work, except that the tax bill issued in his favor, makes for him a *prima-facie* case, *i. e.*, he may recover, unless it be shown affirmatively by the defendant, that he has no right under the fundamental law of contract." And "that defendant has a right to show that he is not 'worthy of his hire.'" To this might be added that the defendant has also a right to show that the contractor violated the eighth commandment, which the evidence undoubtedly showed he did in this case.

III. It was not necessary for the defendant to show the precise location of his lots on the street, or that the foundation of the pavement was specially defective immediately in front of them. The evidence and the theory of the instructions given went to the character

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of the foundation under the whole mile and three-quarters of pavement, and it ought to be enough to defeat any tax bill, that there was a shortage of about one-third in the principal portion of the whole of it. This was the same as if nine inches of concrete had been put down under two-thirds of the pavement and none at all under one-third of it. The contract in this respect must have been substantially, at least, performed before there could be any recovery at all. It is true that a defendant cannot show, in order simply to get a reduction of his tax bill, that there was defective work in front of other lots, but he can show defective work in front of other lots if such defects are so extensive as to render the whole contract substantially incomplete; in which event the tax bills are void without reference to any special defect in the work immediately in front of defendant's property. Otherwise a defendant might be required to pay for a pavement which was not laid at all on any other part of the street, except in front of his own lot, although the contract called for a pavement one and three-quarter miles in length, as in this case. *Meyer v. Wright*, *supra*.

PHILIPS, P. J.—The result of this opinion may perhaps be more logically apparent by stating that the action herein is founded in contract, and not on a *quantum meruit*. The petition sets out that the work was authorized by a certain ordinance of the City of Kansas, and that Comstock & Halsey were the contractors thereunder, who did the work, and received the tax bills therefor from the city engineer. But for the fact that the charter of the city makes such a tax bill *prima-facie* evidence of the regularity of every essential precedent act, it would have devolved upon the plaintiff, in developing its case, to prove such antecedent matters, such as the existence of the requisite ordinance, the making of the contract conformably thereto, and the performance of the contract on the part of the contractors. The fact, however, that the charter makes the

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tax bill *prima-facie* evidence of such performance, does not alter the character of the action, as one founded on contract expressed.

The action, then, is subject to the legal incidents of one founded on a special contract, except in so far as the charter may otherwise permit. *Meyer v. Wright*, 19 Mo. App. 283, 287. It is the well-settled rule of law that where the petition counts on the contract no recovery can be had on a *quantum meruit*. *Eyerman v. Cemetery Ass'n*, 61 Mo. 498; *Lewis v. Slack*, 27 Mo. App. 119. Nothing short, therefore, of a substantial compliance with the contract in question would authorize a recovery by plaintiff in this action.

Appellant's counsel contends, however, that under the charter it is permissible to recover as on a *quantum meruit*, and that defendant's counsel by the form of their answer have ingeniously sought to evade the spirit of the charter exception. Reliance for this contention is placed upon the following provision contained in section four, article eight, of the amended charter of the city: "Such certified bill (tax bill) shall, in any action thereon, be *prima-facie* evidence of the validity of the bill, of the doing of the work, and of the furnishing of the material charged for, and of the liability of the property to the charge stated in the bill: *Provided*, that nothing in this section shall be so construed as to prevent any defendant from pleading in reduction of the bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner."

It is first to be observed that this *proviso* is a reservation—a beneficial provision—for the protection of the defendant taxpayer. The defendant may or may not interpose such defence. If the defendant should plead the general issue, or its equivalent, going to the very foundation of the plaintiff's cause of action, designed to wholly defeat it, the case would stand on the contract, and not on a *quantum meruit*.

The special defence pleaded by the defendant here

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comes not within the terms of the language of the *proviso*, "that the *work* therein mentioned was not done in a good and workmanlike manner." This clearly has reference only to the manner of doing the work. It does not touch the instance of a failure to employ the material, in kind and quantity, called for in the contract, or agreed upon or acquiesced in by the parties concerned. But it pertains solely to bad workmanship in employing the material and putting it into the construction. It applies to the lack of skill or negligence in doing the mechanical work; and not to the case of a failure, as claimed by respondent, to complete the work as called for in the plans and specifications. The defect complained of here goes to the very substance of the contract. The contract required nine inches of concrete as a *substratum* for the blocks, whereas the contractor only employed six and three-quarters of concrete. No question is made but that the workmanship in putting in the concrete, as far as it went, was good enough; but it was not the concrete foundation called for by the legislative body of the city, and that prescribed in the contract. It is the same as if A should contract with B to put in a foundation for a house, of stone, two feet wide, and three feet below the surface of the ground, and B should put in one, one foot wide and one foot deep. There could be no recovery on the contract by B. In the judgment of the municipal legislature a pavement laid on nine inches of concrete was essential to permanency, and to meet the wants of the public and those whose property was to be burdened with paying for it. It is, therefore, not too much to say, in my opinion, that this contract was not substantially complied with, as the jury found. The instructions given by the court properly presented the real issue.

The further question raised by the appellant is, that the evidence failed to show that the pavement in front of defendant's property was properly constructed. It is true that the evidence does not affirmatively show

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that the concrete in front of defendant's lots was not up to the requirements of the contract. But it does show that an examination made of about eight-ninths of the street developed the fact that the concrete fell short three inches and more of what the contract called for. The only points not so examined on the line on the street were between Eighth and Ninth streets, and possibly between Seventh and Eighth. There is nothing in the record before us to show that defendant's property lay between these particular blocks. For aught we know it may be directly opposite to the portion of the street examined and tested by the witnesses. If in fact the defendant's property lay opposite to that portion of the street not examined, it was a matter easily proved by plaintiff. The plaintiff presented no such question directly in any instruction asked by it. If the question of fact was raised at all, it was in the instruction in the nature of a demurrer to the evidence.

Therefore, as the matter now stands, the question is, conceding the pavement throughout Broadway, extending from Third to the most southerly street of the city, say over eighteen blocks, to be defective, as claimed by the witnesses, would the fact that there was no direct evidence as to the condition of one or two blocks on the line authorize the court to take the case away from the jury? It would not be an unreasonable inference for the jury to make, that as the whole work was done by the same contractors, about the same time, and under the same contract, that eight-ninths of it was bad from being done in a particular manner, the remaining one-ninth was done in the same way. Such an inference must be allowable, otherwise the defendant's proof might have to go to the extent of showing that every square yard of the work, from Third to Twentieth street, was excavated and measured. The rule of "the known and experienced connection subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy" (1 Greenl. Evid. 17) very aptly applies to such a state of case. The court could not

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properly take such question of fact from the jury under the state of proofs before them. This, in connection with the further fact, that the assessment made on defendant's property, under the scheme of the charter, is apportioned according to his frontage to the whole cost of the work done along the whole line of the improvement, justified the action of the court in overruling the demurrer to the evidence.

It was for a completed improvement of the street that defendant's property was taxable, under the scheme of the ordinance. This is unlike the case of *Creamer v. Bates*, 49 Mo. 554, where the property-owner was specially damaged by reason of the manner of doing the work in front of his property. But it is that of a street not completed according to the ordinance and the contract, in which case there can be no recovery against one abutting property-owner until the street is completed throughout. *City to use v. Clemence*, 49 Mo. 554.

It follows that the judgment of the circuit court is affirmed. All concur.

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W. WIRT WITTEN, Respondent, v. JAMES H. ROBISON, Appellant.

Kansas City Court of Appeals, June 13, 1888.

JUDGMENT—ENTRY OF NUNC PRO TUNC—RULE IN THIS STATE—CASE ADJUDGED.—Under the established rule in force in this state (whatever the rule may be, on the subject, elsewhere), to justify the court in directing the entry of the judgment *nunc pro tunc*, it was essential for the records of the court to show two things: (1) That the court had rendered a judgment in this case at the October term, 1888; (2) that the judgment rendered was the judgment, the entry of which was asked to be directed. It is not necessary that the records of the court show, in order to enable it to direct a judgment *nunc pro tunc*, in express terms that such judgment had been rendered; it is sufficient if the facts shown by the records are such as to reasonably carry conviction that the judgment was in fact rendered. *Held*, that the facts appearing of record, in this case, in connection with the fact that no other judgment was entered of record, justified the court in directing the entry, *nunc pro tunc*, asked for. (PHILIPS, P. J., dissents.)

APPEAL from Daviess Circuit Court, HON. CHAS. H. S. GOODMAN, Judge.

Affirmed.

Statement of case by the court.

This was an action for slander. The petition contained three counts. The court instructed the jury at the instance of the defendant to find for him as to the third count. The jury returned the following verdict, as shown by the records of the court:

"We the jury find for the plaintiff on the first count and assess the damages at one hundred dollars; we the jury find for the plaintiff on the second count and assess the damages at four hundred dollars." The judge's docket contains the following entry in relation to the case: "Jury verdict for plaintiff for five hundred dollars."

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The trial was had at the October term, 1883. At the same term, in due time, the defendant filed motions for a new trial and in arrest of judgment, both of which were denied. He also filed his affidavit and bond for appeal, and his bill of exceptions. The appeal was granted, and the transcript of the record in the case was in due time filed in this court. No judgment, however, was entered in the case in the circuit court, and the defendant having discovered said fact dismissed the appeal taken by him to this court

The plaintiff, on the twelfth day of February, 1884, filed a motion in the circuit court in the case asking for a judgment *nunc pro tunc*, but withdrew it on the same day.

Afterwards on February 9, 1887, he filed in the circuit court in this case the following motion for a judgment *nunc pro tunc* and notice thereof:

"Comes now the plaintiff, and moves the court to make and enter an order amending its records in this cause, *nunc pro tunc*, so as to make it conform to the judgment and decree of this court, made at the trial of this cause at the October term, 1883, for the reasons following:

"1. Because at the October term of this court, 1883, the plaintiff herein recovered judgment for the sum of five hundred dollars against the said defendant, James H. Robison, and the clerk failed to enter or spread said judgment on the record.

"2. That the term of the clerk who kept the minutes of the court at said October term, 1883, has expired; we, therefore, ask the court to order the present clerk to enter the said judgment *nunc pro tunc* that the former clerk should have entered."

The notice is as follows:

"You are hereby notified that at the February term, 1887, of the circuit court of the county of Daviess and state of Missouri, to be begun and held on the first Monday of February, 1887, at the courthouse in the town of Gallatin, in said Daviess county, and on the

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first day of said term, or as soon thereafter as counsel can be heard, I, W. Wirt Witten, will file and ask the consideration of a motion asking the court to make and enter of record an order *nunc pro tunc*, amending the record in the above-entitled cause, so as to make it conform to the order of said court, made in said cause at the October term thereof, 1883, as the same appears in the minutes kept by the clerk and judge of the proceedings of said October term, 1883, which proposed amendment is to have the clerk enter of record a judgment herein for the sum of five hundred dollars, obtained by the plaintiff at said October term, 1883, and which said clerk failed and neglected to enter of record at that time."

The motion coming on for hearing, the defendant objected to the hearing thereof for the following reasons:

"Because said motion and notice are too indefinite and uncertain, and so failed to state what the amendment was as asked, and what was intended to be amended; that defendant had no notice of what the plaintiff asked for."

The objections were overruled and the hearing of the motion was proceeded with. The facts heretofore stated by us with reference to the verdict of the jury; the motions for new trial and in arrest of judgment; affidavit and bond for appeal, and allowance of appeal; and the bill of exceptions, were all made to appear from the records of the circuit court.

The former motion for a judgment *nunc pro tunc*, and its withdrawal, were also shown. And the following admission was made by the defendant: "It was here admitted by the defendant that the appeal heretofore taken in this cause had been dismissed by defendant in the appellate court on account of there being no final judgment in said cause, the mandate dismissing same being now on file in this court."

This was all the evidence.

The court rendered judgment on said motion in

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favor of plaintiff, and directed the clerk to enter, as having been entered at the October term, 1883, a judgment in the case in favor of the plaintiff in accordance with the verdict returned by the jury.

The defendant duly excepted to this action of the court, and filed his motions for new trial and in arrest of judgment. The motions being overruled, the defendant has in due form brought the case here.

ALLEN H. VORIES, for the appellant.

I. The court erred in rendering the judgment *nunc pro tunc*. The notice given by plaintiff to defendant, and the motion filed for said judgment, failed to set forth the respect in which the record was defective, and suggest the amendment with which he proposed to cure the defect. *Weed v. Weed*, 25 Conn. 337; *Means v. Means*, 42 Ill. 50; *Hill v. Bower*, 5 Wis. 386; Freeman on Judgments, sec. 72. The court erred in admitting any evidence on the part of plaintiff on his motion to correct said judgment. The notice claimed, "to make the record," "to conform to the minutes kept by the clerk and judge of the proceedings of said October term, 1883," when the proof offered was entirely and wholly different.

II. There was no record to amend by, made by either the judge or clerk of the court. When the court omits to render a judgment which it ought to have rendered, it has no power at a subsequent term to render it *nunc pro tunc*. The failure of the court is not a clerical misprision, and the record can be amended only by matter of record. Freeman on Judgments, secs. 70, 71; *Hyde v. Curling*, 10 Mo. 359; *Saxton v. Smith*, 50 Mo. 490; *Dunn v. Raley*, 58 Mo. 134; *Barlow v. Steel*, 65 Mo. 611; *Koch v. Railroad*, 77 Mo. 354; *Smith, Adm'r, v. Steel*, 81 Mo. 455; *Blize v. Castlio*, 8 Mo. App. 290.

III. The application of plaintiff was not made in time. The plaintiff had notice that no judgment had been rendered more than three years before this present application to amend was made, and filed a motion

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therefor, which he voluntarily withdrew. Applications to correct clerical errors must be made promptly after their discovery, and then only in furtherance of justice, and on such terms as to protect the rights of all. Freeman on Judgments, sec. 72, 73; *Rogers v. Rogers*, 1 Paige Ch. 188, and authorities there cited; *Emery v. Whitehead*, 6 Mich. 491; *McCormick v. Wheeler*, 36 Ill. 114; *Perdue v. Bradshaw*, 18 Ga. 287; *McClanahan v. Smith*, 76 Mo. 428.

IV. The record in this case shows that defendant (supposing a final judgment had been rendered), in December, 1883, appealed the case to this court, where it was dismissed by appellant on account of there being no final judgment in said cause. If plaintiff, by waiting until the time had elapsed for appeal or writ of error, could deprive defendant of all remedy to correct the error of the trial court prior to the alleged amended judgment, then such delay would give him an unconscionable advantage over defendant, unless his laches destroyed his right to his judgment *nunc pro tunc*. Authorities *supra*.

V. From all which appellant contends that the court erred in rendering its judgment *nunc pro tunc*. Because it shows from the records that the court ordered no judgment rendered upon the verdict of the jury. Because there was no proper record evidence that any judgment had ever been ordered by the court, which the clerk failed to enter. Because plaintiff, by his delay, had forfeited all right to have any alleged judgment amended.

E. M. HARBER and R. A. DEBOLT, and WM. M. RUSH, for the respondent.

I. The respondent claims that the bill of exceptions filed by appellant at the October term, 1883, should be wholly disregarded in determining the appeal from the judgment *nunc pro tunc* taken in February, 1887, for the reasons: (1) That immediately after filing the transcript

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in 1883 in this court, appellant dismissed his appeal. (2) That, in dismissing his appeal, appellant lost all his right to have the action of the trial court appealed from in 1883, reviewed by this court on his appeal from the judgment amending the record *nunc pro tunc* at the February term, 1887. (3) The appeal taken in 1887 did not revive the appeal taken and dismissed in 1883, nor did the former appeal revive the right lost by dismissing the latter. (4) The bill of exceptions filed in 1883 was not read in evidence at the hearing in February, 1887, of the motion of respondent to amend the record, consequently ought not to have been incorporated in the bill of exceptions, filed in the appeal therefrom, and ought not to be considered in determining said appeal. (5) The record shows that appellant knew that the clerk had failed to enter and record the judgment of the circuit court rendered at the October term, 1883, and, knowing of this defect, if he desired to have his appeal heard, his remedy was not in dismissing his appeal, but by having the record amended *nunc pro tunc*, in conformity with the judgment of the court. (6) The effect of the record on the parties thereto was the same whether the judgment of the court was entered or not. Freeman on Judgments, sec. 72*a*; *Emery v. Whitwell*, 6 Mich. 491. (7) That the appeal from the judgment *nunc pro tunc* in 1887 was taken more than three years after the trial and dismissal of the appeal of 1883. A judgment cannot be brought up on a writ of error after three years from the date of its rendition, although it may have been corrected *nunc pro tunc*. *Railroad v. Mockbee*, 63 Mo. 350. In this respect, appeals are on all-fours with writs of error, except that appeals must be taken during the term at which the judgment is rendered. Rev. Stat., 1879, sec. 3712, as amended in Laws of Mo., 1885, p. 215.

II. The notice and motion of respondent for the amendment of the record *nunc pro tunc*, sets forth clearly in what respect the record was defective, and specifically states the desired amendment. The notice

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states that "You are hereby notified that at the February term, 1887, of the circuit court of Daviess county, Missouri, on the first Monday of February, 1887, and on the first day of said term, or as soon thereafter as counsel can be heard, the respondent will file his motion asking the court to amend the record made in the cause at the October term, 1883, to make it conform to the record of the court," "which proposed amendment is to have the clerk enter of record a judgment herein for the sum of five hundred dollars, obtained by the plaintiff at said October term, 1883, and which said clerk failed to enter of record at the time." The motion states, "because at the October term, 1883, the plaintiff herein recovered judgment for the sum of five hundred dollars against the defendant James H. Robison, and the clerk failed to enter or spread said judgment on the record." The object and purpose of the notice is to give the party interested an opportunity to be heard on the motion. The record shows conclusively that he was present and urged his objections thereto. The notice fulfilled its office. The defendant had his day in court on the motion.

III. Where the clerk fails to enter up a judgment, the court may correct the matter and order proper entries at any time. *Turner v. Christy*, 50 Mo. 147, 148; *Sexton v. Smith*, 50 Mo. 490; *Gibson v. Chouteau*, 45 Mo. 171; *Railroad v. Mockbee*, 63 Mo. 348; Freeman on Judgments, secs. 70, 71. As between the parties to a judgment there is no time fixed by statutes within which entries *nunc pro tunc* must be made. *Koch v. Railroad*, 77 Mo. 355. Such entries and amendments may be made at any time, or subsequent term. *Turner v. Christy*, 50 Mo. 148; *Gibson v. Chouteau*, 45 Mo. 173; *Smith v. Steel*, 81 Mo. 455. The facts may appear of record, or by docket entries, or from the papers on file. *Sexton v. Smith*, 50 Mo. 491; *Gibson v. Chouteau*, *supra*. At the hearing of a motion to correct a judgment at a subsequent term, evidence competent in any

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other investigation will be received. Freeman on Judg., sec. 72.

IV. The defendant appealed from the judgment rendered at the October term, 1883, and immediately thereafter dismissed his appeal. This is evidence that he knew, and had notice of the defect in the record or omission of the clerk more than three years before the appeal of 1887 was granted. And defendant admits that he had such notice. If the record was imperfect or incomplete, he should, instead of dismissing his appeal, have suggested a diminution of the record, had it perfected and his appeal of 1883 heard on its merits. It was defendant alone that was interested in having the action of the court reviewed. He was the only party complaining of the record, his remedy was to take the necessary steps to have it corrected. Failing in this he lost his right to be heard on the appeal. Such corrections can be made while the appeal is pending in the appellate court, and the presumption is always in favor of the action of the court. *Bank v. Allen*, 68 Mo. 475, 476. Had he moved in the matter at the proper time, he would not be here now complaining of unconscionable advantages. If plaintiff has gained any advantage whatever it has been by and through the laches of defendant in not seeking his remedy at the proper time or in the proper way. It was optional with respondent to rest on the record as it stood, or have it perfected by the entry of the judgment. There being no third party whose rights have intervened, and the matter resting between the original parties to the suit, amendments to the record by entries *nunc pro tunc* can be made at any time. The appeal from the judgment of 1887 amending the record is all that is properly before this court, the appellant having lost his right to be heard on his former appeal by his voluntary dismissal. Inasmuch as there was no error committed by the court in the trial of the original cause nor the amendment of the record and verdict of the jury, and the judgment being for the right party the judgment ought to be affirmed.

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HALL, J.—The only matter which we can consider on this appeal is the action of the court below in rendering judgment on a motion for a judgment *nunc pro tunc*. The court ordered the entry of a judgment on the verdict in favor of plaintiff as of the term at which it should have been made. If in so ordering the court erred, the judgment entered should be reversed. But, on the other hand, if the action of the court in that respect was correct, we cannot consider the errors complained of during the trial of the case which resulted in the verdict, because the appeal from the judgment ordered and not entered was dismissed by the appellant, and is in no sense pending in this court. This appeal, now before us, is not an appeal from a judgment for the first time ordered by the court on the verdict returned by the jury, but is an appeal from the judgment of the court directing that the clerk enter the judgment on the verdict which was ordered by the court at the term during which the verdict was returned. In other words if the judgment of the court on the motion was correct, it is because the court rendered a judgment at the October term, 1883, on the verdict, which the clerk failed to enter; from the judgment so rendered and not entered the defendant took an appeal and dismissed it, and, hence, that appeal is no longer pending; this appeal is from the judgment of the court directing the entry of the judgment rendered, but not entered, at the October term, 1883, and, hence, on this appeal we can consider nothing but the action of the court in making such direction.

The question, therefore, is, did the court properly order the judgment *nunc pro tunc?*

The motion and notice are not open to the objection that they are indefinite and uncertain. They clearly stated that a judgment had been rendered in favor of plaintiff against defendant at the October term, 1883, for the sum of five hundred dollars, and that the clerk had failed to enter such judgment; and they clearly

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stated that the amendment of the record sought was to have that judgment entered of record.

Under the established rule in force in this state, whatever the rule on the subject may be elsewhere, to justify the court in directing the entry of the judgment *nunc pro tunc*, it was essential for the records of the court to show two things: (1) that the court had rendered a judgment in this case at the October term, 1883; (2) that the judgment rendered was the judgment, the entry of which was directed. It is not necessary that the records of the court should show, in order to enable it to direct a judgment *nunc pro tunc*, in express terms that such judgment had been rendered. If the facts shown by the records are such as to reasonably and fairly carry conviction that the judgment was in fact rendered, that is sufficient.

In this case no judgment at all was entered. These facts appearing of record, viz., the verdict of the jury, the filing and overruling of the motions for new trial, and in arrest of judgment, were such as to necessarily and as a legal consequence result in the judgment directed *nunc pro tunc*. From these facts, in connection with the fact that no other judgment was entered of record, I think that it must be presumed that the court ordered the judgment which was their necessary consequence. *Railroad v. Mockbee*, 63 Mo. 350; *Jones v. Hart*, 60 Mo. 358, opinion of SHERWOOD, J.

Judgment affirmed. ELLISON, J., concurs; PHILIPS, P. J., dissents.

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STATE OF MISSOURI *ex rel.* MICHAEL DUGGAN, Petitioner, v. DANIEL DILLON *et al.*, Respondents.

St. Louis Court of Appeals, June 16, 1888.

PROHIBITION—APPEAL—SUPERSEDEAS.—An appeal bond in a sum less than the amount of the judgment or decree appealed from will not operate as a *supersedeas*; and the court in which the judgment was rendered cannot be restrained by prohibition from enforcing the same by execution.

APPLICATION for a writ of prohibition.

Petition dismissed.

A. J. P. GARESCHÉ, for the relator: Pending an appeal, the court had no right to make the order of distribution, because a violation of its own decision at the previous term in the same cause. By appeal it lost all jurisdiction of the case. *Ladd v. Couzins*, 35 Mo. 513; *Stewart v. Stringer*, 41 Mo. 405; *Baasen v. Eilers*, 11 Wis. 77; *Bryan v. Berry*, 3 Cal. 135; *Levi v. Karrick*, 15 Iowa, 444; *Isler v. Brown*, 69 N. C. 125; *Thomas v. Sullivan*, 11 Nev. 280; *Whaley v. Charleston*, 8 S. C. 346; *Holland v. State*, 15 Fla. 552. "But writ of error or appeal lies." True, as a rule, this fact is an answer to a writ of prohibition, but not always. High on Ex. Rem. [2 Ed.] p. 632, sec. 789. In 20 N. Y. 531, the court divided as to the right of oyer and terminer to grant a new trial, but concurred unanimously, that if it erred, prohibition was the proper remedy. And especially do we cite: *State v. Wilcox*, 24 Minn. 147; 21 W. Va. 141, and authorities. And if the order be not a judgment as to the point that then this court has no jurisdiction, because an interference with the jurisdiction of the Supreme Court, there is an express answer in *State v. Seay*, 23 Mo. App. 628. Was there an

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appeal? Why not? There was no recovery against Thornton, Duggan, or Kenrick. Under judgment rendered no execution could have issued for any sum not even for the costs. Freeman on Judgments [3 Ed.] sec. 51. All that the petition asked was, that as plaintiff held a judgment against Thornton which he could not collect, that its amount, principal, interest, and costs, should be a lien on the payments to Thornton accruing from the trust fund in the hands of Archbishop Kenrick. This the decree did do—found how much there was unpaid on this judgment and sequestrated for its payment the annuities then due and later to accrue to Thornton. The court had no right to go further in respect to Archbishop Kenrick. It has no jurisdiction of the fund in his hands. And especially it could not in this action, where the reversioners were not parties, and only the annuitant for life. Moreover, though, by the appeal, the judgment is superseded, that leaves in full force the order of January 18, 1887, which directed that the future payments to accrue should be by the archbishop paid into the hands of the clerk. So, too, this question of an appeal is *res adjudicata*. I assume that somewhere resides the jurisdiction to determine it. And I assume that it resides in the circuit court whose duty it is to approve the bond and the sureties, with power during the term to set it aside for cause. But that having granted the appeal the case then becomes of the jurisdiction of the Supreme Court. If proper bond have been given, then the appeal is valid, the circuit court is stripped of its jurisdiction, the order of distribution void. Hence the writ prayed for must issue. If respondent be aggrieved his application must be to the Supreme Court. *State v. Judges*, 47 Mich. 646; *Keyser v. Farr*, 105 U. S. 266; *State ex rel. v. Judge*, 30 La. Ann. 1016.

CUNNINGHAM & ELIOT, for the respondent: The writ of prohibition applied for by the relator should be denied. (1) Because by virtue of the appeal taken on

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the twenty-ninth of March in the case in the circuit court, jurisdiction of that appeal vested immediately in the Supreme Court of Missouri. That court being already possessed of that cause, this court should not interfere with its supervision of the inferior court touching that case. (2) This extraordinary remedy of a writ of prohibition will not be applied by courts except "in cases where the exigencies of the particular case make the exercise of the power an imperative duty in order to prevent the miscarriage of justice." *State ex rel. v. Seay*, 23 Mo. App. 629. "It should never be granted against the inferior tribunal except in cases where the usurpation of jurisdiction by that tribunal is clear." *Ibid.* (3) The writ of prohibition will not issue if the proceeding sought to be prohibited is only ministerial. High on Extra. Rem., sec. 769; *State ex rel. v. Clark County*, 41 Mo. 44. The order of the circuit court entered on the eighth of May was a ministerial and not a judicial act. It did not seek to affect the decree already entered nor the merits of the controversy which had been adjudicated. High on Extra. Rem., sec. 769, and cases cited. (4) The writ if issued in this case would operate simply as a stay of execution of the decree of the circuit court. The only method provided by law for the stay of execution where an appeal has been taken, is the giving by the appellant or some one for him of a bond with sureties in a penalty double the amount for which judgment is rendered. Rev. Stat., sec. 3713. The giving of such a bond as will stay execution is a matter at the risk of the appellant, who alone is required if he desires to stay execution to see to it that his bond is sufficient under the statute to effect that object. Neither the trial court nor the court exercising supervisory control over the trial court can help the appellant if he fails to see to it that his bond is sufficient. *State ex rel. v. Adams*, 9 Mo. App. 464. The stay of execution is in Missouri purely a matter of statute. *Railroad v. Atkison*, 17 Mo. App. 494; *State*

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v. Horner, 10 Mo. App. 318. The language of the statute (sec. 3713) is imperative. It provides (speaking of the allowance by the court of an appeal), "such allowance thereof shall stay the execution in the following cases, and no others." Here the legislature has not only undertaken to prescribe the conditions precedent to a stay of execution, but it has expressly forbidden the courts to exercise any discretion whatever. If the sureties upon the bond are sufficient and the conditions of the bond are such as the statute prescribes, then the trial court is bound to accept the bond offered, no matter what its penalty. It is, therefore, absurd to say that because the trial court accepted a bond, that bond operated a stay of execution. *Railroad v. Atkison*, 17 Mo. App. 494, 495; *State ex rel. v. Adams*, *supra.*

THOMPSON, J., delivered the opinion of the court.

This application arises in this way: On the sixteenth of June, 1881, Michael Carroll recovered a judgment in the circuit court of Dubuque county, Iowa, against John Thornton for the sum of $4,499.00 with interest and costs. Thereafter Carroll commenced a suit in equity in the circuit court of the city of St. Louis, to sequester certain annuities payable to Thornton as life tenant by Peter Richard Kenrick, trustee. By consent, Archbishop Kenrick paid into court two semi-annual instalments of the profits of the estate held by him, and the court made an order that he should pay into court the successive instalments until the further order of the court, subject to his right of an allowance to be thereafter made, which should be taxed as costs in the cause. By agreement, Michael Duggan was made a party defendant in the character of assignee of the interest of Thornton. In the meantime Carroll died, and the suit was revived in the name of Tittmann, public administrator. Thereafter such proceedings were had that, on the twenty-sixth day of January, 1888, a final decree was entered, charging the plaintiff's judgment on the rents, issues, and profits of the fund in the hands

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of Archbishop Kenrick, requiring him to pay the same into court for the use of the plaintiff until the amount found due by the decree should be satisfied, or until the death of Thornton should appear; directing the clerk of the court, after the payment of the costs, to pay the balance of the fund in his hands (paid into his hands by Archbishop Kenrick, as already stated) to the plaintiff Tittmann, and providing that the cause be retained for the further satisfaction of the decree in the manner aforesaid, until the same be fully satisfied, or until the death of the defendant Thornton be made to appear to the court. From this decree the defendant Duggan, professing to act for himself and the other defendants, prosecuted an appeal to this court, and gave an appeal bond, couched in the usual terms, in the sum of eight hundred and fifty dollars. The plaintiff's judgment with interest and costs amounted at the time of this decree to something more than six thousand dollars, but as the fund out of which the instalments issued, which Archbishop Kenrick was required by the decree to pay into court, was settled upon him in trust to pay the same to Thornton during his natural life, remainder to others, the amount which would ultimately be paid into court under the decree might at any time be determined by the death of Thornton. It is to be noticed, in this state of facts, that there is a question of some difficulty, whether the appeal properly lay to this court or to the Supreme Court, but we pass this as a matter not necessary to our decision.

The judgment of the circuit court was in favor of the plaintiff Tittmann in the sum of $6,323.19. The fund presently disposed of by the judgment of the court appears to have exceeded nineteen hundred dollars. The death of Thornton might prevent the fund disposed of under the judgment from ever reaching the sum of twenty-five hundred dollars, though if he should live until the decree should be satisfied by the gradual sequestration of the profits of the fund in the hands of the archbishop, according to its terms, the amount paid

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into court, and thence paid to the plaintiff, would, as already seen, amount to more than six thousand dollars, which amount would oust this court of jurisdiction and vest the appellate jurisdiction over the cause in the Supreme Court.

After this appeal had been granted and this bond given, and the term at which the decree was rendered had elapsed, on motion of the plaintiff, the court made an order upon the clerk to pay over to him such sum as was then in his hands subject to the decree, after satisfying the costs then accrued. To restrain the execution of this order, Michael Duggan, the appellant and defendant in that suit, brings into court a petition for a writ of prohibition against the judge of the circuit court, the clerk of said court, and the public administrator, who is the plaintiff in that suit. The substantial question for our decision is, whether the circuit court is acting without jurisdiction in directing the disbursement of this fund, and, if so, whether the petitioner has exhausted his remedy in that court.

This court is of opinion that the order of the circuit court is merely an order in the nature of an *execution* of its decree; that the bond, which was given in the sum of eight hundred and fifty dollars, is not a sufficient bond to supersede the execution of the decree, under the terms of section 3713 of the Revised Statutes; and that, consequently, the circuit court has jurisdiction to proceed with the execution of its decree under the doctrine announced by this court in *State ex rel. v. Adams*, 9 Mo. App. 464. By the terms of the statute (Rev. Stat., sec. 3713), the allowance of an appeal stays the execution "in the following cases, and no others: * * * Second, when the appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court, shall, during the term at which the judgment appealed from was rendered, enter into a recognizance to the adverse party, in a penalty double the amount of whatever debt, damages, and costs, or damages and costs, have been recovered by

such judgment, together with the interest that may accrue thereon, and the costs and damages that may be recovered in any appellate court upon appeal;" etc. It is scarcely necessary to say that, where the fund which is the subject of the immediate operation of a final judgment is over nineteen hundred dollars, which appears to be the case here, and subject to be increased by semi-annual payments of six hundred dollars, a bond in the sum of eight hundred and fifty dollars does not satisfy this statute and work a *supersedeas* of the decree. Unless, therefore, there is something in the circumstance that this fund is in the hands of the clerk, and that the subsequent payments of instalments by the trustee will be made to the clerk until a fund is raised sufficient to satisfy the decree, unless the life tenant dies in the meantime to take the case out of the statute, the case must be decided for the defendants upon the reading of the statute, and in view of its settled construction, without entering upon any further consideration. An appeal may be prosecuted without giving any bond at all; and, where an appeal bond is tendered, the court to which it is tendered is concerned only with the goodness of the sureties, and not with the amount of the bond. The appellant must see, at his peril, that the bond is sufficient in amount to operate as a *supersedeas* under the statute, and whether it does so operate is a question which does not arise for decision when the bond is tendered, but which arises (as in the present case) when execution is sued out to enforce the judgment, notwithstanding the appeal. *State ex rel. v. Adams*, 9 Mo. App. 464. A *supersedeas* is obtained only by complying with the statute, and an appeal bond works a *supersedeas* only when it is sufficient under the terms of the statute. *Mo. Pac. Ry. Co. v. Atkison*, 17 Mo. App. 494.

The statute contains no exceptions applicable to a case where the fund disposed of by the judgment is in the hands of the clerk of the court or of any other bonded officer. And, while the fund would undoubtedly

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be entirely safe in the hands of the excellent and responsible officer who now holds it, yet as the law has made no exception applicable to such a case, we can make none. The same observations may be made concerning so much of the decree as requires the archbishop to pay the successive instalments into court until the further order of the court. If the appeal were held to be a *supersedeas* of the decree, it would seem that it would operate as a *supersedeas* of that part of the decree which requires the archbishop to pay these instalments into court; so that, during the pendency of the appeal, the plaintiff will have, for the performance of this part of the decree, no better security than the solvency of the trustee who holds the fund. While there is not the slightest room to doubt that the venerable prelate who has taken on himself the burden of acting as trustee in this case will comply with the decree of the court so far as he is concerned; yet it is to be observed here, as in the case of the clerk, that the law—and especially the statute law,—does not adjust its rules according to the character of particular persons.

It is stated in the petition and was pressed upon our attention in the oral argument, that the circuit court fixed a bond in the sum of eight hundred and fifty dollars, as a bond which, under the circumstances of the case, would operate as a *supersedeas* of the decree. The circuit court can only speak by its records, and no record of that court has been presented to us which contains any order characterizing the bond as sufficient for a *supersedeas*. We cannot adjust our holdings to any allocution, which may be shown by oral testimony or otherwise, to have passed between the circuit judge and a party before him tendering an appeal bond. The judge was bound, under our decision in *State ex rel. v. Adams*, *supra*, to accept a bond in any sum which was tendered, provided he found the sureties to be good; and the question whether the bond would operate as a *supersedeas* of the judgment did not arise then, but properly arose when the plaintiff moved for an order in the

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nature of execution. Whatever may have been said by the judge to the appellant, when the bond was accepted, would not change the law, or be the act of the court, or estop the court, in respect of its subsequent dealings with the case; nor can it have any effect on our decision.

The circuit court, then, had authority to proceed with the execution of its decree, notwithstanding the appeal; and, laying out of view any other questions which might have been discussed if this conclusion were at all doubtful, the judgment of the court will be that the present petition be dismissed. It is so ordered. PEERS, J., concurs; ROMBAUER, P. J., is absent.

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31	544
74	105
31	544
87	509

SOPHRONIA E. STONE, now OSTRANGER, and husband, Respondents, v. J. W. PENNOCK, Executor of SAMUEL M. BOWMAN, Deceased, Appellant.

Kansas City Court of Appeals, July 2, 1888.

1. PRACTICE—TRIAL BY COURT—INSTRUCTIONS, HOW CONSIDERED IN THIS COURT—CASE ADJUDGED.—Where a case is tried by the court without the intervention of a jury (as in this case), this court will consider the declarations of law given and refused only for the purpose of determining the theory on which the court tried the case. And every presumption must be made by this court in favor of the action of the trial court.

2. CONTRACT—SIGNING BY ONE PARTY—EFFECT OF ACCEPTANCE, ETC.—CASE ADJUDGED.—Although one of the parties to a contract does not sign it,—but only the party of the other part,—still if the party not signing accepted the contract and performed the services therein called for (as in this case) there is no merit in the objection that it was not signed by her.

3. ——— TERMS OF AS TO WHEN COMPENSATION WAS TO BECOME PAYABLE.—The fact, in this case, that the entire compensation fixed by the contract was to become due and payable on the death of the deceased, does not render the contract void as being against public policy.

4. ——— LEGACY—RULE CONCERNING AS TO SATISFACTION OF DEBT. In the case of a legacy to a creditor, the rule is that when the legacy is the same in amount as the debt, still the legacy shall not (in the absence of proof that the intention of the testator was that it should) be deemed satisfaction of the debt; if the legacy is to be paid on terms less advantageous to the creditor than the terms on which the debt is payable.

APPEAL from Jackson Circuit Court, HON. JAMES H. SLOVER, Judge.

Affirmed.

The case is stated in the opinion.

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C. O. TICHENOR, for the appellant.

I. The evidence shows that the purpose of the agreement was to give plaintiff two thousand dollars. There was no consideration for it. It had no effect on the conduct of the parties. Plaintiff did not sign it.

II. When the agreement was made deceased had not made his will. The agreement is testamentary in its character and designed as such. It was to put the transaction, as one witness says, "above the law." It is void for this reason. *Haydock v. Haydock*, 34 N. J. Eq. 575.

III. By his will, Bowman, among other things, left her two thousand dollars. The legacy of an equal amount may be a satisfaction of a debt. *Crouch v. Davis*, 23 Gratt. (Va.) 92; *Strong v. Williams*, 12 Mass. 395; *Pollock v. Wornall*, 28 Ch. Dis. 552.

IV. A confidential relation existed at the time this contract was signed. "It is settled by an overwhelming weight of authority, that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation in it need not be legal; it may be moral, social, domestic, or merely personal." 2 Pom. Eq., sec. 956, p. 480. Of course, a nurse comes within the rule. *Bayliss v. Williams*, 6 Coldw. 442, and cases cited. There never was a case where a patient was subject to the influence and control of a physician, as the deceased was subject to that of plaintiff.

V. "Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction

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could not have been impeached, if no such confidential relation had existed." 2 Pom. Eq., sec. 956, p. 479. The language of the Supreme Court of the United States, is as follows: "But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from taint of selfish interests, and cunning and over-reaching bargains. If means of personal control are given, they must be always restrained to purposes of good faith and personal good." *Taylor v. Taylor*, 8 How, 200; *Ford v. Hennessey*, 70 Mo. 591; *Bradshaw v. Yates*, 67 Mo. 228; *Garvin v. Williams*, 44 Mo. 478; *Cadwallader v. West*, 48 Mo. 496; *McLure v. Lewis*, 72 Mo. 314.

VI. Going on the theory that the agreement was not one for a gift, even then we find that she gets fifty-nine hundred dollars for three months' services, which she had all along agreed were worth only twenty-six dollars per month and board of child. In *Kelly v. Caplice*, 23 Kas. 477, the court says: "She thought herself in a condition to exact an unconscionable bargain and for services worth only a few cents, she demanded and received a written promise for the payment of nearly five hundred dollars. The mind revolts from the enforcement of such a promise, and the courts as a rule, under such circumstances, seize upon the slightest act of oppression or advantage to set at naught a promise thus obtained."

VII. It was to the interest of the deceased to be well cared for, so that his health might be restored. That was the reason why plaintiff was serving him. So soon as the agreement was signed their interests conflicted. The sooner he died, the sooner she would get the two thousand dollars. Not only this, but she would be relieved from much care and trouble, and would have the unexpired term, in which to do other work. Such a contract is against public policy. Wald's Pollock on Contracts, 568.

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WASH ADAMS and R. H. FIELD, for the respondent.

I. That the contract sued on was executed and delivered (or its delivery authorized) by S. M. Bowman, appellant's testator, and that Mrs. Stone faithfully performed the services therein called for, stand conceded, hence there is nothing in the objection that Mrs. Stone's name was not signed to this contract. *Hutchison v. Railroad*, 37 Wis. 600, 601; *Railroad v. Derkes*, 103 Ind. 520; *Lewis v. Ins. Co.*, 61 Mo. 534; *Lindell v. Rokes*, 60 Mo. 249; *Mastin v. Grimes*, 88 Mo. 478.

II. The inconsistencies of the positions taken by the learned counsel for the appellant in his brief, as deductions from the facts of this case, are marked. (1) The claim is that the contract sued on was a simple gift from General Bowman. (2) That it was a cruel and oppressive obligation extorted by Mrs. Stone from him. As to the first the court gave an instruction for defendant, that if it was a gift plaintiff could not recover. As to the other position no instruction, embodying this theory, was asked or refused by the trial court, and the evidence shows that no undue influence was exercised or attempted. Is this court going to say that his executor shall not discharge out of this large estate the pitiful sum sued for by this lady and agreed to by General Bowman for the humiliating and faithful service conceded to have been rendered him simply because it may be true that he might have retained her for a less sum—or will it allow and enforce the contract so solemnly executed, and so carefully designed to be carried out by him? Said the Supreme Court of this state in *Lindell v. Rokes*, 60 Mo. 252, reiterating with approval a statement made in an early case in this state: "This court is not aware of any law releasing men from their lawful contracts, unless in cases of fraud, imposition, accident, or mistake in their creation, and neither of which appear or can be shown in this case to defeat the contract sued on. The presumption is in favor of the validity of this contract." *Priest v. Way*, 87 Mo.

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16. The appellant has just as much right to contest the amount provided (in the third clause of the will) for interring and erecting a monument over General Bowman and his wife, as he has to contest the adequacy or inadequacy of the sum sued for, for the services rendered.

III. Mrs. Stone testified that the contract sued on was never substituted by any other arrangement, and that she performed the services therein called for, relying upon its validity. The trial court believed her, and this court will defer to its judgment as to her credibility. *Russell v. Adkins*, 24 Mo. App. 605. Besides, the execution of the written contract sued upon was *per se*, a supersedure of all anterior contracts. *Hagar v. Hagar*, 71 Mo. 610; *Chrisman v. Hodges*, 75 Mo. 413. There is no evidence of any arrangement subsequent to the execution of the contract sued on. The simple payment and receipt of twenty-six dollars per month after that, as before, for possible exigencies of Mrs. Stone, did not, *per se*, substitute the contract sued on. It was certainly never designed by either of the parties that it should have that effect. The court below deducted these payments as credits on the amount sued upon. This was as much as appellant was entitled to have therefrom. And were the specific evidence lacking as to the character and value of the services of this plaintiff, the fact that the contract is in writing would alone negative the assertions of the learned counsel (unsupported by any evidence as they are) of no or an inadequate consideration. *Lindell v. Rokes*, 60 Mo. 249; *Williams v. Jenson*, 75 Mo. 685. But the record teems with testimony showing the onerous and precarious character of the services, and of her uniform fidelity in their discharge.

IV. There was no intention to adeem this debt by legacies. 2 Redfield on Wills [3 Ed.] 190. Both the will and codicil show that the amounts therein were added, and were not intended to be in payment of the debt sued upon. 2 Williams on Ex'rs [last Ed.] 1406;

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2 Roper on Legacies, 53. The rule is that there is no warrant for the inference, that the one is intended to be a substitute for the other unless the legacy be payable at the same time and place and as advantageous to the creditor as his debt. 2 Roper on Legacies, 38.

V. But had Bowman intended the legacies to be in ademption, that would constitute no defence to this suit, when it is not pretended that Mrs. Stone has ever received one cent of either of such bequests. It would certainly be with the plaintiff to elect between them. Adams' Equity, marg. p. 105.

VI. Nor is the contract sued upon void for the reasons set forth in the last point of counsel for appellant. Contracts for a bequest or devise, or for a stipulated sum for services during the life of the employer (and in these instances for large rewards) have frequently been before the courts, and were repeatedly affirmed. One of the cases cited by the learned counsel for appellant was such a contract, and it was enforced. We refer now to the case of *Strong v. Williams*, 12 Mass. 395. See, also, same by our own Supreme Court. *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Hiatt v. Williams*, 72 Mo. 214.

HALL, J.—The plaintiff Sophronia E. Stone, now Ostranger by marriage, presented her claim to the probate court for allowance. The claim was based on the following agreement executed by the defendant's testator: "Memorandum of agreement made this third day of March, 1885, between Sophronia E. Stone of the first part, and Samuel M. Bowman of the other part, all of Kansas City, Missouri, witnesseth, that the said Sophronia E. Stone hereby agrees for and in consideration of the sum hereinafter mentioned to serve the said S. M. Bowman, in capacity she now occupies as nurse for himself and to superintend his household affairs and to attend to all other matters that require her attention, for the term of three years from the twenty-third day of October, 1884. For the faithful performance of these duties,

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on the part of the party of the first part, S. M. Bowman agrees to pay her the sum of two thousand dollars. It is faithfully agreed to by the parties hereto that in event of the death of the said S. M. Bowman before the expiration of the three years above stated, the further services on the part of the said Sophronia E. Stone shall cease and the two thousand dollars shall be due and payable in full. In testimony of the foregoing the parties hereby bind themselves, their heirs, executors, administrators and assigns, and have hereunto affixed their hands and seals the date above written.

[Seal] "S. M. BOWMAN.

"Witness present:

"D. ESTAING DICKERSON."

The agreement was acknowledged before the defendant Pennock, as a notary public.

The deceased, a man of prominence and of considerable wealth, in amount about one hundred and fifty thousand dollars, the evidence showed was, in September, 1884, stricken with paralysis.

He was a married man, but without children, and his wife was hopelessly insane. He was thus in need of that care and attention, which only a devoted wife ordinarily can give to a man, and he was without a wife able to give them. Under such circumstances he advertised for a housekeeper, and the plaintiff, a widow at that time with one child, a daughter named Daisy Stone, answered the advertisement, and was employed to take care of him. Her wages were at first fixed at eighteen dollars per month. In about six weeks they were raised to twenty-six dollars per month and the board of her child.

The evidence showed that the plaintiff made a most faithful housekeeper and nurse for the deceased, giving to him the care and attention that no wife could have exceeded, and that mere money cannot fully compensate. The deceased fully appreciated the services thus rendered and in various ways exhibited a generous disposition to compensate the plaintiff for them as fully as

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it lay in his power to do so. The evidence all showed, however, that in no wise did the plaintiff do anything to induce the deceased to exercise such generosity except by the faithful and devoted treatment and care towards him as his nurse and servant, and that all the deceased did for the plaintiff or proposed to do for her, he did out of a generous impulse naturally and spontaneously arising from her devoted care.

On the third day of March, 1885, the deceased voluntarily entered into the agreement in controversy. Although not asking for the agreement, and in no manner inducing it, the plaintiff accepted it, and continued to discharge her duties as housekeeper and nurse until the death of the deceased in June, 1885. After the execution of the agreement, the plaintiff received from the deceased the sum of fifty-two dollars, wages for two months' services. The deceased conveyed to plaintiff a lot in Kansas City, which she afterwards sold for twenty-nine hundred dollars. All the evidence showed that the conveyance of the lot was not made in satisfaction of the agreement in suit. Before making the agreement in suit, the deceased executed an agreement by which he contracted to give the plaintiff certain personal property. The will referred to this agreement, and, under the provisions of the will, the defendant executor delivered the property to the plaintiff. The property was of the value of five hundred dollars. The will of the deceased gave a legacy of five hundred dollars to the plaintiff's child, Daisy Stone; and it also gave to the plaintiff the sum of one thousand dollars, and the codicil added to this bequest the sum of one thousand dollars. But, by the provisions of the will, all the legacies were to be paid after the death of the wife of the deceased. The will was dated March 17, 1885; the codicil, May 16, 1885. There was no evidence that the legacies given by the will were intended to satisfy the obligation imposed on the deceased by the agreement in suit, but, on the contrary, all the evidence tended to show the contrary.

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The court sitting as a jury gave the following declaration of law for the plaintiff:

"If the court, sitting as a jury, believes, from the evidence, that the testator, S. M. Bowman, executed the contract sued on and read in evidence, and delivered the same, or authorized the delivery of the same, to plaintiff, then Mrs. Sophronia E. Stone; that she accepted the same and performed the services therein called for under the said contract up to the time of the testator's death, then she should recover herein the sum of two thousand dollars, less any sum of money, if any, that may have been paid her by him on account of said contract before his death, after the execution and delivery thereof."

The court gave for defendant the following declaration of law:

"6. That if the sum of two thousand dollars mentioned in said agreement of March 3, 1885, was intended by the parties thereto as a gift, plaintiff cannot recover."

And refused to give the following:

"1. That, under the admitted facts and circumstances of this case, plaintiff cannot recover."

"2. That the agreement of March 3, 1885, upon which plaintiff claims, is null and void, and plaintiff cannot recover thereon."

"3. That in no event could the agreement of March 3, 1885, bind Bowman, as it was signed by him alone."

"4. That the sum of two thousand dollars, twenty-six dollars per month, and board of child, is an unreasonable and unconscionable charge for three months' services such as were performed by plaintiff, and cannot be allowed for that reason."

"5. That the said agreement of March 3, 1885, is null and void, for the reason that there was no consideration for the same."

"7. That it was the purpose and object of said agreement of March 3, 1885, to give plaintiff the sum of two thousand dollars in the event of the death of said Bowman, and hence she cannot recover."

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"8. That under the facts and circumstances of this case the legacy amounting to two thousand dollars to plaintiff in the will of Bowman, was intended by him to take the place of two thousand dollars mentioned in the said agreement of March 3, 1885, and it was not the intention of said testator that she should get said sum of two thousand dollars twice."

"9. That the two thousand dollars given to plaintiff by Bowman in his will is a satisfaction of the two thousand dollars specified in the said agreement of March 3, 1885."

"10. The court declares the law to be that if S. M. Bowman, during the six months immediately prior to his death, was paralyzed and perfectly helpless, so much so that he had to be cared for by plaintiff, as if he were a little child, that she had to be with him constantly night and day, had to wash him, clothe him, and give him his medicines, that said Bowman had no children, and that his wife was in such a condition that she could not attend to him, and if said Bowman by the contract of employment paid her eighteen dollars per month at first, and afterwards, under a new arrangement, paid her twenty-six dollars per month and boarded her child, and that she was paid the sum of twenty-six dollars per month, and her child was furnished with board until said Bowman died, and if said Bowman, during the term of said employment, gave plaintiff a lot of ground, which she has since sold for twenty-nine hundred dollars, and that under his last will and testament plaintiff is given the sum of two thousand dollars and personal property worth five hundred dollars, and that her child is also given the sum of five hundred dollars, and that plaintiff was in no way related to the deceased, then said agreement so sued on, made two months prior to said Bowman's death, is null and void."

Under the declarations of law the court found the amount claimed by plaintiff less the sum of fifty-two dollars.

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This case was tried by the court without the intervention of a jury. For this reason we shall consider the declarations of law given and refused only for the purpose of determining the theory on which the court tried the case.

The declaration of law given for the plaintiff ignores the question of undue influence on the part of the plaintiff, by reason of the confidential relations with the deceased, having procured the contract in suit. But, even if it be conceded that under the circumstances of this case the burden rested on the plaintiff of proving that no such influence was used, since no declaration of law was asked on the question by the defendant and since every presumption must be made by us in favor of the action of the court, we must hold that the court ignored the question of undue influence, not on account of a mistaken view of the law, but because of its opinion that there was under the evidence no undue influence in the case. Such opinion, we think, amply justified by the evidence.

The plaintiff accepted the contract and performed the services therein called for, hence there is no merit in the objection that the plaintiff did not sign the contract. *Lindell v. Rokes*, 60 Mo. 247. The contract was in its liberality and generosity in the nature of a gift, but it was not for that reason a gift in law. The services, in the consideration of which the deceased made the contract, had not been rendered by the plaintiff, and she was under no legal obligation to render them; the mere fact, that she would have rendered them without the compensation named in the contract, cannot prevent her from recovering that compensation when she accepted the contract and rendered the services called for by it.

The fact that the entire compensation fixed by the contract was to become due and payable on the death of the deceased does not render the contract void as being against public policy. Similar contracts in this respect to the contract in suit have been upheld in this state. *Eupton v. Eupton*, 47 Mo. 37; *Sutton v. Heydon*,

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62 Mo. 101; *Hiatt v. Williams*, 72 Mo. 214. But this fact, *i. e.*, that such compensation was to be payable on such death, in the absence of any evidence to the contrary, conclusively disproves the intention of the deceased to make the legacies provided in the will and the codicil satisfaction of the contract. The legacies were to be paid after the death of the wife of the deceased, and not before. These terms were less advantageous to the plaintiff than the terms on which the compensation fixed by the contract was to be paid to her; and the rule is that, where the legacy is the same in amount as the debt, still the legacy shall not (in the absence of proof that the intention of the testator was that it should) be deemed satisfaction of the debt, if the legacy is to be paid on terms less advantageous to the creditor than the terms on which the debt is payable. 2 Rorer on Legacies [1 Am. Ed.] 38, 41, 42, 44, 45; *Strong v. Williams Ex'rs*, 12 Mass. 393.

The judgment was, we think, for the right party, and is affirmed. All concur.

31	561
41	331
31	555
49	276
31	555
68	560
31	555
74	150
31	555
84	647

R. STEELE RYORS, Respondent, v. GEORGE W. PRIOR, Appellant.

Kansas City Court of Appeals, July 2, 1888.

1. PRACTICE—PLEADING—WAIVER OF OBJECTIONS—CASE ADJUDGED. Under the practice act of this state (Rev. Stat., sec. 3519), all objections to the petition, excepting only the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action, are deemed waived, unless they be made by demurrer or answer. All objections to mere formal defects (as the one here) are waived by pleading to the merits, and are cured by verdict. The requirement that the petition specify the term of the court is one of form merely.

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2. ——— VERDICT—SUFFICIENCY OF TO SUPPORT JUDGMENT—CASE ADJUDGED.—Under the provisions of sections 3629 and 3654, Revised Statutes, relating to verdicts, when the issue is for the recovery of money only, etc., the verdict, if for the plaintiff, should also assess the amount of the recovery. But *held*, that the verdict in this case, though informal, was sufficient, being, "We, the jurors, find for the plaintiff one thousand dollars."

APPEAL from Osage Circuit Court, HON. RUDOLPH HIRZEL, Judge.

Affirmed.

The case is stated in the opinion.

G. T. WHITE and TRABER & GIBSON, for the appellant.

I. We claim that the petition is insufficient both in its heading or caption and in its conclusion. The first paragraph of section 3511 of the practice act, in stating what a petition shall contain, says, among other things, that it shall specify the term of the court. This being a positive command, we insist that it does not fall within the defects that are cured by verdict. In the case of *Pier v. Heinrichoffen*, 52 Mo. 335, EWING, J., referred to this section, and says that the forms of pleading, as well as the rules for their sufficiency, are to be determined by this section. And although the statute at that time did not contain this requirement, yet it has now become part of the section, and entitled to the same respect as the original.

II. Then as to the concluding part. Although the statute does not call for it, yet, on examination of all the forms given in the statute, and particularly when it is on an account, the petition invariably concludes with an averment that the amount sued for is then due. And as these forms, years ago, were adopted by a legislative act which has not been repealed, I take it that they have all the force and effect that they would have if incorporated in the practice act itself. The case of *Brown v. Kimmel*, 67 Mo. 430, is a suit for attorneys' fees and

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bill of items filed as in this case, and the petition asks for judgment "for the balance due." Besides, while the petition is in some respects minute in its details, in setting out the contract sued on, there is nowhere any showing as to what time defendant was to pay plaintiff. The pleadings on both sides show that payments had been made, and defendant, in his answer, avers that he paid him all that he owed; and taking out the two one thousand-dollar items, and the two hundred and fifty-dollar item referred to in our statement, it will be seen that plaintiff's bill was more than paid. The two hundred and fifty-dollar item shows from the remarks that are opposite it that it should not have been included in the claim sued for, there being no showing that Lambeth would have employed plaintiff, or that he would have paid him that sum, or any other sum, for his services. And as this shows on its face that plaintiff was not entitled to any of this, we are left to infer that the jury, in making up their verdict, and in computing the amount, may have counted this in and included it in their verdict. And if so, this of itself ought to be ground for reversing the judgment. The remark opposite the item is substantially part of the petition. It was of itself a cause of action that might have been sued on by itself. And if it had been so sued on, no pleader would insist that plaintiff had a good cause of action, if his averments in the petition were the same as the words that are here used. And the fact that defendant not having demurred to it, an answering don't cure the defect. And this is a defect of a character that is not cured by the verdict. And the defect is properly brought to the attention of the court by motion to arrest judgment. It falls within the rule as laid down in Gould's Pleading, chapter ten, sections twenty to twenty-three and forty-four.

III. This is not a case in which the averment is defectively stated, but there are omissions of the necessary averment. *Clinton v. Williams*, 53 Mo. 144; *Langford v. Sargen*, 40 Mo. 160; *Corpenny v. Sedalia*,

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51 Mo. 88; *Jaccard v. Anderson*, 32 Mo. 188; *Welch v. Bryan*, 28 Mo. 30. Here the gist of the action is omitted, and hence not cured by verdict. *Hart v. Wine Co.*, 91 Mo. 419, 420.

IV. Again we insist that the court erred in directing the jury to disregard all evidence offered by defendant in support of his counter-claim. No demurrer had been filed to it, nor had any denial been made that put the matters as therein set out in issue. In fact, the allegations and claim stood as confessed. While the statute (sections 3524, 3525, and 3526) requires plaintiff, by way of replication, to deny any new matter that may be set up in the answer, it was not sufficient merely for a reply to defendant's answer, and then deny all the new matter therein contained. This, we insist, leaves the counter-claim unanswered and confessed. And even outside of this, the reply does not come up to what we would consider a sufficient answer to the new matter, as the above sections of the statute require. *Watson v. Hawkins*, 60 Mo. 550; Bliss on Pleading, secs. 393, 396. The verdict is insufficient in its finding, and so written on a separate slip of paper, and so worded, that no court should be sustained in receiving it in such form and entering up a judgment on the same. There is nothing in this paper to indicate that the finding was on the issues in the case, as required by section 3628 of the statutes. But on the other hand, it would seem, from the way they report to the court, that plaintiff had lost some money, and these men come into court and report that they, as jurors, and not a jury, had found one thousand dollars that had belonged to plaintiff, and to be sure to indicate that they are not doing it as a jury, one of them signed his name, giving only the initials of his Christian name, and adding to it the word forman, and not foreman, and there is nothing in it to indicate that he was foreman of the jury. And until the clerk, after they had been discharged, wrote on the back of the slip of paper the names of plaintiff and defendant, there was nothing about it to indicate what it was

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intended for, or to show in whose favor or against whom the verdict was intended to have been rendered. Again, we insist that the finding of the jury is not sufficient, there being nothing to indicate that their finding was on the issues, and that they made a computation or assessment of the amount due. *Cates v. Nickell*, 42 Mo. 169; *Cattel v. Pub. Co.*, 88 Mo. 356; *Litton v. Rogers*, 39 Tex. 152; *Heath v. Lynch*, 96 Ill. 406; *Davy v. Webb*, 28 Conn. 540; 3 Graham and W. on New Trials, 1378; *Wynn v. State*, 1 Blatchford, 28; Archibald's Crim. Prac. 667, quoting 4 Bl. Com. 360.

SMITH, SILVER & BROWN, for the respondent.

I. The objection that the petition does not allege the term of court to which the action was brought comes too late after verdict. It was at most a cause of action defectively stated. *Roberts v. Walker*, 82 Mo. 200; *Grove v. City*, 75 Mo. 675. Where one "pleads to the merits he thereby waives objections to formal defects and will not be heard on the trial (*a fortiori* after trial) to object that the petition does not state a cause of action." *Grove v. City*, 75 Mo. 675. Besides the term of the court sufficiently appears from the entire record. And courts will take judicial notice of terms of court. 65 Mo. 183; 64 Mo. 382.

II. The petition is good certainly after verdict against the objection that it does not state the fees sued for were due. (*a*) The account, on its face, purports to state that the fees therein named are due. (*b*) The petition charges that defendant was to pay a reasonable compensation for plaintiff's services stated in the account. The compensation was, therefore, due immediately on the rendition of the services. 40 Barb. 119. Where no time for payment is specified in a note, it is payable on demand. 1 Daniel Neg. Inst., sec. 88. In this case suit was a demand. Rev. Stat., sec. 1018. (*c*) Although a material fact is not expressly averred, yet if it is necessarily implied from what is stated in the petition, the latter is good after verdict. *Grove v. City*, 75 Mo. 675;

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Boone v. City, 51 Mo. 461. Taking the averments of the petition and the account together it is certainly to be implied that the fees sued for were due.

III. (*a*) The counter-claim is part of the answer (Rev. Stat., sec. 3521), and, therefore, the denial of the new matter in the answer necessarily denied the facts set up in the counter-claim. (*b*) Besides the case having been tried on the theory that the counter-claim was denied, it is too late for defendant to raise that question after trial. *Howell v. Reynolds*, 51 Mo. 154. (*c*) Again the court directed the jury to disregard the counter-claim, to which no exceptions were saved. The action of the court in so doing, is not rightly raised in the motion in arrest of judgment. *White v. Caldwell*, 17 Mo. App. 691.

IV. Even if the two hundred and fifty-dollar item in the account did not fall within the averment of the petition, this was no ground for arresting the judgment. (*a*) Because objection to evidence, as to the item, was the proper course. No evidence is preserved in the bill of exceptions. The verdict is conclusive on the facts. *Kimmel v. Benna*, 71 Mo. 645. (*b*) The item itself was a proper charge. *Kersey v. Garton*, 77 Mo. 645; *McElhinny v. Kline*, 6 Mo. App. 94.

V. The verdict sufficiently shows that the issues were passed on by the jury. *Rembaugh v. Phipps*, 75 Mo. 422. We ask for an affirmance of the judgment with ten per cent. damages. Rev. Stat., sec. 3777.

HALL, J.—This was an action by plaintiff on account, for services rendered by him as an attorney.

Several objections are urged by defendant, who is the appellant here, which we cannot consider, for the reason that the defendant as respects them did not save his exceptions. The defendant urges that the petition is fatally defective for two reasons: (1) Because the petition fails to specify the term of the court at which the action was brought; (2) because the petition fails to allege that the account sued on was due at the time of the institution of the action.

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The first objection is based upon section 3511, Revised Statutes, which provides that the petition shall contain: "First, the title of the cause specifying the term, and the name of the court and the county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants." Under our practice act all objections to the petition, excepting only the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action," are deemed waived unless they be made by demurrer or answer. Rev. Stat., sec. 3519. All objections to mere formal defects in the petition are waived by pleading to the merits, and are cured by verdict. *Grove v. City*, 75 Mo. 675. The first objection is to a formal defect. The requirement of the statute that the petition specify the term of the court, is a requirement as to form merely, and in no wise goes to the cause of action or the jurisdiction of the court. The fact that the requirement is made by statute is of no force. The question is, is the requirement one of form only; if it is, it matters not how it is made, by statute or otherwise. Being formal, it is waived unless the objection based on it is made as required by section 3519, Revised Statutes. The objection here was made after answer to the merits, and must be deemed waived.

The second objection is also untenable. This is an action on account for the value of services rendered by plaintiff as an attorney. The petition sets out the services rendered, states their value, and charges that the defendant had refused to pay them. Compensation for the services rendered, on the face of the petition, appears to have been due when demanded; and demand was made, because as alleged the defendant had refused to pay. Besides in this case suit was a demand. Rev. Stat., sec. 1018. The jury returned a verdict in these words:

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"We, the jurors, find for the plaintiff one thousand dollars. G. W. Pointer, Forman."

The point is made by defendant's counsel that the verdict is not sufficient under our statute to support a judgment. By section 3629, Revised Statutes, it is provided: "In every issue for the recovery of money only, or specific real or personal property, the jury shall render a general verdict." By section 3634, Revised Statutes, it is provided: "When a verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess the amount of the recovery; so also, if they find for the defendant in case of offsets or other demand for money." It was necessary for the jury to return in their verdict, not only a general finding in favor of plaintiff, but also the amount of the recovery in his favor assessed by them. The amount of the recovery was an issue in the case, and the jury had to return a finding thereon in their verdict. *Coates' Adm'r v. Nickell*, 42 Mo. 170; *Burghart v. Brown*, 60 Mo. 24; *Poulson v. Collier*. 18 Mo. App. 604. The verdict in this case was informal, but was in our opinion sufficient. It contained a general finding in favor of the plaintiff followed with the amount of such finding. This with sufficient clearness designated the amount named as the amount of the recovery assessed by them in plaintiff's favor. *Rembaugh v. Phipps*, 75 Mo. 422. In this case, which was an action for conversion, the verdict was: "We, the jury, find a judgment for the plaintiff for the sum of ninety dollars." Of this verdict the court said: "The verdict is informal, but it clearly enough appears that it is a verdict in favor of plaintiff for ninety dollars damages." As to the suggestions made by the defendant's counsel against the sufficiency of the verdict on account of its recital "We, the jurors" instead of "We, the jury," and of the mis-spelling of the word "Foreman" we deem it sufficient to say that such clerical inaccuracies cannot be permitted to destroy the verdict of a jury. After the verdict was read and the jury polled, the clerk

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made the following indorsements upon the back of the verdict: "Ryors vs. Prior"—"The Verdict." The indorsement made by the clerk under these circumstances was sufficient to identify the verdict as the one returned in this case.

Judgment affirmed. All concur.

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MILLAN & ABBOTT, Respondents, v. BENJAMIN C. PORTER, Appellant.

Kansas City Court of Appeals, July 2, 1888.

1. PRACTICE—VERDICT OF JURY, HOW FAR BINDING ON THIS COURT. The verdict of the jury is binding upon this court as to all facts necessarily found by the jury, in order to reach the verdict, and to prove which there was sufficient evidence.

2. CONTRACT—REAL ESTATE BROKER—TERMS OF EMPLOYMENT—CASE ADJUDGED.—Where the owner, as in this case, fixed only one term of the proposed sale of real estate, all the other terms were left open to be afterwards fixed by him at his pleasure. But the brokers were only required, by their contract, to find a purchaser at the price fixed by the owner, on such terms, in other respects, as might be agreeable to him. And there was no evidence tending to prove that the brokers abandoned the contract.

3. ——— DUTY OF BROKERS IN NEGOTIATING SALE—NOT BOUND TO MAKE ACTUAL SALE.—The duty of a real estate broker, under an ordinary contract of employment, is to procure a purchaser on the owner's terms, and bring the two together. He is not bound to negotiate the trade, nor to make the actual sale.

4. ——— ——— KNOWLEDGE THAT BROKER PROCURED PURCHASER, IMMATERIAL.—The fact that the owner did not know, at the time of making the sale to the purchaser, that the latter had been procured by the broker, is immaterial. The right to a recovery by the broker depended upon the fact that he had procured a purchaser, and not upon the knowledge, on the part of the owner, of that fact at the time of the sale.

APPEAL from Buchanan Circuit Court, HON. VINTON PIKE, Special Judge.

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Affirmed.

Statement of case by the court.

This was an action begun by plaintiffs before a justice of the peace to recover compensation as brokers for effecting the sale of real estate of the defendant.

The statement was as follows:

"Mr. Benjamin C. Porter, to Millan & Abbott, Dr.
To commission on sale of dwelling-
house, on Francis street, bet. 17th
and 18th streets....................$100"

No answer was filed, none being required under our practice before a justice of the peace, but the defence, as stated by defendant's counsel in their brief here, was as follows:

(1) That defendant placed the property in the hands of plaintiffs for sale, and agreed to pay them one hundred dollars for their services provided they would sell the property for the sum of four thousand dollars cash, which they failed to do.

(2) That plaintiffs abandoned the contract to sell the property for defendant.

(3) That defendant sold the property himself, after plaintiffs had abandoned the contract, without the assistance or influence of the plaintiffs, to the same party, however, that plaintiffs were trying to sell it to, but defendant had no knowledge or information that it was the same party until after he had consummated the sale.

The defendant had judgment before the justice of the peace, and the plaintiffs appealed to the circuit court. On a trial in the latter court the plaintiffs had judgment from which the defendant has appealed to this court.

As to the question of the plaintiffs' employment there was the testimony of the plaintiff Abbott and the defendant. Abbott testified that he learned that defendant's property was for sale and went to the latter's house. Abbotts' testimony on this question is then thus

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set out in the defendant's abstract of the record: "I asked him if he wanted to sell it. He said yes. Q. What is your price? A. Four thousand dollars. I then told Mr. Porter that I represented the real estate firm of Millan & Abbott, and that I thought we had a customer for his place. Will you pay a commission out of the four thousand dollars? He said, 'yes; I will give you one hundred dollars.' I told him that that was not a full commission, but that I would take it, as I thought I had a customer for the place. I said, 'If I see my customer to-night, I will come back to-night.'" The defendant's testimony on this question was as follows:

"Mr. Abbott came to my house about March 1 and said, that he understood my property was for sale. I told him it was. 'Well,' he says, 'I think I have a buyer for you; and what is your price?' I told him my price was four thousand dollars, cash. Mr. Abbott then asked me what I would give him if he sold on those terms. I told him I would give him one hundred dollars. 'Well,' he said, 'I will go and see if the man will take it.' He told me the man who wanted the property was a Mr. Shumaker. He lived just across the fence from me. I told him a few days before my place was for sale, and I thought it was his (Shumaker's) brother that was buying the place, who lived up in the north part of the city."

Immediately upon leaving the defendant's house, after the agreement as to the employment of his firm, Abbott saw Shumaker, who agreed to take the property for four thousand dollars, fifteen hundred dollars to be paid in cash, the balance in six months and one year. Abbott at once, on the same day, so reported to the defendant. The defendant declined to sell on the proposed terms, but insisted on the cash payment of the whole purchase price, explaining that he wished all cash in order to enable him to purchase certain property which he contemplated buying. Abbott left the defendant, stating that he would see Shumaker again and report to the defendant that day or the next morning. Abbott saw Shumaker, reported to him the terms of

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payment demanded by the defendant. Shumaker stated that he could not pay all cash, and remarked, "Well, that ends it."

As to what then occurred the testimony of Abbott and of Shumaker, the latter of whom testified for the defendant, did not agree. Abbott testified: "I said, 'Hold on, you want the property, and you can get the money from some one else, and pay Mr. Porter,' and Mr. Shumaker said, 'I will think about that until morning.' I said, 'All right, I will see you in the morning.' I saw Mr. Shumaker the next morning and said to him, 'What about the property?' He said, 'I will see Mr. Porter at noon and arrange about that.' I told him he had better go immediately or 'you may not get it.' He said, 'I will get it,' and asked me what to do.. I told him to pay some money on the trade, and to draw up writings, etc. He said, 'Very well; I think I can arrange with him to give him a check if I can see him.' I supposed, of course, he was going right to Mr. Porter. Mr. Shumaker, that evening or the next morning, told me had purchased the property."

Shumaker testified: "Then Mr. Abbott said he had to go back again that night or in the morning to report, but I told him it was no use, that I could not buy it for cash. Mr. Abbott came back some time in the forenoon of the next day, and I asked him if he had seen Mr. Porter. He said, no, he had not, asked if I had seen him, and I told him no, I had not. I asked him if it would not be better for me to go up there as I still thought of buying the place to see Mr. Porter now. He thought it would be very well for me to see him. I went up there and purchased the place about noon. My wife sent me word that if I wanted the place, that I had better come up and purchase it, as Mr. Porter was about to sell it to some other parties, but I had left the store before I received the message. I heard it when I got home."

All the testimony, however, agreed as to this: That

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Abbott did not return to the defendant's, and that Shumaker did go to the defendant's, and did purchase the property on these terms: Fifteen hundred dollars in cash, notes for the balance of the purchase price of four thousand dollars payable in six and twelve months, with the understanding and agreement that if the defendant needed the balance, he should have it whenever he called for it. The stipulation as to the payment of the balance whenever called for satisfied the defendant.

The court gave for the plaintiffs the following instructions:

"If the jury believe from the evidence that defendant promised to pay plaintiffs one hundred dollars, if they would find some person who would purchase the premises, in proof, at the price of four thousand dollars, and if they further believe, that plaintiffs, or either of them, found such person ready and willing to purchase at that price, then the jury must find for plaintiffs, in the sum of one hundred dollars."

Of its own motion the court gave the following instructions:

"(*a*) That if you find from the evidence that defendant put the property mentioned in the evidence in the hands of the plaintiffs for sale, and at that time instructed them to sell it for cash, and that they were unable to sell it to Shumaker except for part cash and part credit, and that afterwards defendant himself sold the property to Shumaker for part cash and the balance to be paid whenever defendant demanded it, then the verdict must be for the defendant."

"(*b*) The court instructs the jury, that even though you find from the evidence, that defendant employed the plaintiffs to sell the property mentioned in the evidence, for a cash price, and agreed to pay them the sum of one hundred dollars for their services, in case they sold it; yet, if you further find from the evidence, that plaintiffs were unable to procure the agreement of Shumaker to take the property, upon the terms

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given to them, by defendant, then the verdict must be for the defendant; notwithstanding, you may further find from the evidence that defendant sold the property to the said Shumaker, to whom plaintiffs were trying to sell it."

"(c) That if you find from the evidence that plaintiffs offered the property to witness Shumaker for the sum of four thousand dollars cash, at the direction of defendant, and that plaintiffs were unable to sell the same to him on those terms, and that afterwards Shumaker went to defendant and purchased the property from him, for part cash, and the balance to be paid whenever defendant should demand, then you will find for defendant; provided, you further find from the evidence that the plaintiffs were engaged by defendant to find a purchaser for a cash price."

And the court refused to give the following instructions asked by the defendant:

"1. The court declares the law to be that under the pleadings and evidence in this case, the finding must be for the defendant."

"2. The court instructs the jury, that even though they find from the evidence, that defendant employed the plaintiffs to sell the property mentioned in the evidence, and agreed to pay them the sum of one hundred dollars, for their services, in case they sold it, yet if you further find from the evidence, that plaintiffs were unable to sell the property upon the terms given to them, by defendant, then the verdict must be for the defendant; notwithstanding, you may further find from the evidence, that defendant sold the property to the same person plaintiffs were trying to sell it to."

"3. That if you find from the evidence, at any time before the sale was completed, that defendant instructed plaintiffs to sell the land for cash, then they are bound by that instruction, and if you find from the evidence, that they were unable or failed to sell for cash, they cannot recover in this suit, and it is immaterial upon what terms defendant sold the land, or to whom he sold it."

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"4. That if you find from the evidence, that defendant put the property, mentioned in the evidence, in the hands of the plaintiffs for sale, and at that time instructed them to sell it for cash, or at any time thereafter and before the sale was made by them, instructed them to sell for cash, and that they were unable to sell it to Shumaker, except for part cash and part credit, and that afterwards defendant himself sold the property to Shumaker for part cash, and the balance to be paid whenever defendant demanded it, then your verdict must be for the defendant."

"5. That if you find from the evidence, that plaintiffs offered the property to Shumaker for the sum of four thousand dollars cash, at the direction of defendant, and that plaintiffs were unable to sell the same to him on those terms, and that afterwards Shumaker went to defendant and purchased the property from him, for part cash, and the balance to be paid at such time as defendant should demand, then you will find for defendant."

"6. That the burden of proof in this case is upon the plaintiffs and they must, by the preponderance of the evidence, establish their case, to the reasonable satisfaction of your minds, and if they have failed to do this, or if the evidence for the plaintiffs and that for the defendant is equally balanced, then you must find for the defendant."

"7. That even though you find from the evidence, that defendant told Abbott that he wanted four thousand dollars, and said nothing about cash payment, yet, in law, that is the same as if defendant had told plaintiff Abbott that he wanted four thousand dollars cash, and in such case plaintiffs had no right to sell for anything, but for a full cash payment."

WOODSON & WOODSON, for the appellant.

I. The instruction given by the court, for plaintiffs, was error. Because said instruction wholly ignores the terms upon which the property was to be sold, whether

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for all cash, or part cash, and the balance on time. This was one of the main issues in the case. It hypothecates a state of facts, and upon their existence directs a verdict for plaintiffs, which state of facts do not cover all the issues in the case. *Thomas v. Babb*, 45 Mo. 386, 387; *Raysdon v. Trumbo*, 52 Mo. 37, 38; *Goetz v. Railroad*, 50 Mo. 474, 475; *Wyatt v. Railroad*, 62 Mo. 411; *Flori v. St. Louis*, 69 Mo. 342, 343; *Bank v. Armstrong*, 62 Mo. 73. It is true said instruction further on tells the jury: "If they further believe that plaintiffs, or either of them found such person ready and willing to purchase at that price, etc." But this does not cover the issue as to the time the purchase money was to be paid. *Brown v. McCormick*, 23 Mo. App. 148; *Martin v. Johnston*, 23 Mo. App. 184; *Henry v. Bassett*, 75 Mo. 92. Under said instruction, it was not necessary for the jury to find anything at all about what were the terms of the contract, as to the time of and the manner of paying the purchase money. *Brown v. McCormick*, 23 Mo. App. 184; *Clark v. Hammerle*, 27 Mo. 70; *Mansur v. Botts*, 80 Mo. 658. The rule in this class of actions is the agent must produce a person who is able, willing and ready to comply with all the conditions imposed upon the agent by the owner. *McGavock v. Woodlief*, 20 How. (U. S.) 221; 1 Parsons Cont. (6 Ed.) 99; *Budd v. Zoller*, 52 Mo. 238; *Frazer v. Wyckoff*, 63 N. Y. 445. The main issue in this case (as to the terms of payment) is ignored in the instructions; which single out certain facts and direct a verdict upon them. This was prejudicial error. *Bank v. Armstrong*, 62 Mo. 73; *Raysdon v. Trumbo*, 52 Mo. 37. The instruction given by the court is misleading, ambiguous and unintelligible. *Legg v. Johnston*, 23 Mo. App. 590; *Green v. Railroad*, 80 Mo. 257; *Wood v. White*, 6 Mo. App. 592.

II. The court erred in refusing defendant's first instruction in the nature of a demurrer to the evidence. There was not a particle of evidence even tending to

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show plaintiffs produced a purchaser who was in a situation, ready and willing, to complete the purchase on the terms agreed upon between plaintiffs and defendant. *McGavock v. Woodlief*, 20 How. 221; *Fraser v. Wyckoff*, 63 N. Y. 445; *Wylie v. Bank*, 61 N. Y. 415; *Budd v. Zoller*, 52 Mo. 238; *Singer v. Hudson*, 4 Mo. App. 145. The evidence is uncontradicted that plaintiffs abandoned all attempts to sell the property. Mr. Porter testified that the last time he saw Abbott, the latter told him that he would go and see Schumaker, and try and get him to pay cash for the place, and that Abbott said he would come back that night and report what Schumaker would do. Where the broker opens negotiations, but fails to bring the customer to the specified terms, abandons them, and the employer the next day sells to the same person at the price fixed, he is not liable to the broker for his commissions. *Wylie v. Bank*, 61 N. Y. 415; *Hoyt v. Shepherd*, 70 Ill. 310; *Carp v. Cummins*, 54 Pa. St. 394; *Chandler v. Sutton*, 5 Daly [N. Y.] 112.

III. The court erred in refusing defendant's second instruction. It was correct in itself and consistent with all the instructions asked by defendant, all of which would have properly presented the law of the case to the jury. *Karle v. Railroad*, 55 Mo. 476, 482, 483; *Whalen v. Railroad*, 60 Mo. 327, 328; *Williams v. Vanmeter*, 8 Mo. 342; *Thomas v. Babb*, 45 Mo. 384, 388. "A broker who negotiates the sale of an estate is not entitled to his commission until he finds a purchaser in a situation, ready and willing to complete the purchase on the terms agreed upon between the broker and the vendor." *McGavock v. Woodlief*, 20 How. 221; *Fraser v. Wyckoff*, 63 N. Y. 445; *Wylie v. Bank*, 61 N. Y. 415.

IV. The court erred in refusing defendant's third and fourth instructions. According to Abbott's own testimony, nothing was said to Porter at the time he placed the property in their hands for sale about the terms of paying the purchase money. A principal has the right to revoke or limit the authority of his agent, at any time, provided the agent's authority is not

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coupled with an interest. *Blackstone v. Buttermore*, 53 Pa. St. 266; *Field v. Farrington*, 10 Wall. 141; *Weed v. Adams*, 37 Conn. 378; *Gilbert v. Holman*, 64 Ill. 549; *Barr v. Schroeder*, 32 Cal. 600. Where nothing is said at the time property is sold about the time and terms of paying the purchase money, the law declares it to be a sale for a present cash price. *S. W. Co. v. Stanard*, 44 Mo. 83; *S. W. Co. v. Plant*, 45 Mo. 519. In order to evade the cash rule, plaintiffs must show not only a custom to the contrary, but that defendant knew of that custom, and that it was so universally known that the law would presume his knowledge of its existence. Cases cited *supra; Ober v. Carson*, 62 Mo. 214; *Park v. Vernon*, 16 Mo. App. 384.

V. The court erred in refusing defendant's fourth and seventh instructions. Because both of them announced the correct rule of law as to the time and terms of paying the purchase money when no agreement is made as to its payment. Cases cited *supra;* 2 Benj. on Sales [Corbin's Ed.] 1025. So also as to defendant's fifth instruction. Cases *supra*.

VI. The court erred in giving instructions of its own motion. They misdirected the jury as to the law, cast the burden of proof upon defendant, when it belonged to plaintiffs, and misled the jury as to the evidence, and submitted questions of law to the jury. *Morgan v. Durfee*, 69 Mo. 480; *Turner v. Railroad*, 76 Mo. 262; *Railroad v. Cleary*, 77 Mo. 638; *Cape Girardeau v. Harbison*, 58 Mo. 93; *Albert v. Besel*, 88 Mo. 153.

VII. A new trial should be granted by the trial court when the verdict is manifestly against the weight and entire current of the testimony. *Taylor v. Fox*, 16 Mo. App. 529; *Leonberger v. Pohlman*, 16 Mo. App. 397.

VIII. The suit was on an actual sale of property, but the evidence showed only an attempt at sale, The instruction submitted a wholly different cause of action.

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This was error. *Nugent v. Curran*, 77 Mo. 328; *Faulkner v. Thornton*, 68 Mo. 469; *Bell v. Corvan*, 34 Mo. 251; *Camp v. Heelan*, 43 Mo. 592. There was a total lack of evidence to support the issue. *Hunt v. Railroad*, 89 Mo. 607.

CROSBY, RUSK & CRAIG, and WM. H. KEARBY, for the respondents.

I. The judgment is not objected to on account of its amount. A jury has passed upon the facts, and if the issues were submitted to them under proper instructions this court will not disturb their verdict.

II. Defendant's first instruction was properly refused. A demurrer to the evidence is not proper when the evidence is conflicting. *Smith v. Hutchinson*, 83 Mo. 683.

III. Even if appellant's seventh instruction stated the law correctly, which it does not do, it was properly refused, for defendant still had a right to sell on other terms, and if he did so to plaintiffs' customer, as was the fact in this case, plaintiffs could recover. *Lloyd v. Mathews*, 51 N. Y. 124; *Coleman Ex'rs v. Meade*, 5 Cent. Law Jour. 409; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638; *Jones v. Adler*, 34 Md. 440. The rule in cases like the one at bar is that a broker who discloses a purchaser, and such disclosure is the foundation upon which negotiations are begun, is entitled to commissions in case of a sale, although the sale be made by the owner without the further assistance of the broker. Cases above cited; *Lincoln v. McClatchie*, 36 Conn. 136; *Goffe v. Gibson*, 18 Mo. App. 1; *Daniel v. Stebens*, 140 Mass. 339; *Woods & Pierce v. Stephens*, 65 Mo. 555.

IV. If the broker procures a person to whom the principal makes a sale on any terms, though special terms were contemplated by the contract, he is entitled to commission. *Keys v. Johnson*, 68 Pa. St. 42; *Stewart v. Mather*, 32 Wis. 344; *Woods & Pierce v. Stephens*, 46 Mo. 555.

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V. These propositions show that the instructions given for the appellant were even more favorable to him than any to which he was entitled. The court gave appellant's second and fifth instructions modified by inserting the cash qualification to the omission of which qualification in plaintiffs' instruction appellant objects; and the court, in instruction (*a*), covered the ground of appellant's third and fourth instructions, omitting appellant's claim that he had a right to change the terms of the contract at any time before the sale. But after plaintiffs had found a purchaser, ready and willing to buy, it would be too late for defendant to so change the terms as to shut out this buyer as plaintiffs' customer, and afterwards himself sell to him. For a principal has no right to take advantage of an agent's work and then refuse to pay him for it. *Lloyd v. Mathews*, 51 N. Y. 124; *Bush v. Hill*, 62 Ill. 216; *Gillette v. Corum*, 7 Kan. 156; *Keys v. Johnson*, 68 Pa. St. 42; *Stillman v. Mitchell*, 2 Robt. (N. Y.) 523; *Stewart v. Mtaher*, 32 Wis. 344.

I.

HALL, J.—Under the instructions given in the case the jury could not have found for the plaintiffs without finding also that the defendant did not at the time of employing the plaintiffs instruct them to sell the property for cash. The verdict of the jury in favor of plaintiffs is binding upon us as to all facts necessarily found by the jury in order to reach the verdict, and to prove which there was sufficient evidence. As to what instructions the defendant gave as to the terms on which the property should be sold the defendant and plaintiff Abbott disagreed. Abbott testified that the defendant named only the price, four thousand dollars; the defendant testified that he in addition to the price designated the manner of payment to be cash. There was, therefore, sufficient evidence to support the finding of the jury in this respect, and we are bound by it.

This case is, then, to be treated by us as if the defendant instructed Abbott to sell the property for

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four thousand dollars, saying nothing more, nothing as to the mode or time of payment. Such being the case the defendant takes the position, advanced in some of the instructions asked by him, that the law presumes that the price of the property was to be paid in cash, and that the case is just the same as if he had instructed the plaintiffs to sell for the price in cash. To this position we cannot agree. Since the defendant fixed only one term of the proposed sale, all the other terms were left open to be afterwards fixed by him at his pleasure. He indeed had the right to demand the payment of the entire purchase price in cash, and to make this demand even after the plaintiffs had produced a purchaser ready, able, and willing to buy the property at the price named on other terms than a cash payment. But, until the demand for a cash payment was made, the plaintiffs were not limited to such a payment; they were only required by their contract to find a purchaser at the price fixed by the defendant on such terms in other respects as might be agreeable to defendant.

II.

As to the second defence mentioned in defendant's brief, the abandonment by plaintiffs of the contract to sell the property, there was no mention in any of the instructions asked by the defendant.

Without holding that, in this case, such fact would excuse the failure of the plaintiffs' instruction to notice said defence, if that failure were otherwise erroneous, we hold that under the evidence in this case it was not erroneous. In our opinion there was no evidence tending to prove that the plaintiffs abandoned the contract. We have set out in the statement of facts all the evidence bearing on this question. It shows, we think, that so far from abandoning their contract the plaintiffs, up to a few hours before the consummation of the sale through their Mr. Abbott, interested themselves in the pending sale of the property; and that if the final visit

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by the proposing purchaser, which resulted in the sale, was not, as testified by Abbott, made to the defendant at Abbott's request, it at least was made with his knowledge and on his advice, "that he thought it would be very well," as testified by the purchaser Shumaker.

III.

The defendant's counsel contend that it was the duty of the plaintiffs under their contract to make an actual sale of the defendant's property, and that by procuring a proposing purchaser who negotiated and completed a purchase of the property on the terms named by the defendant they did not comply with their contract. This contention is not well made. The plaintiffs were employed simply as real estate brokers. There was nothing peculiar in the contract employing them. As brokers they were to procure a purchaser on the defendant's terms and bring the two together. They did not have to negotiate the trade; they did not have to make the actual sale. *Keys v. Johnson*, 68 Pa. St. 43; *Tyler v. Parr*, 52 Mo. 249; *Woods v. Stephens*, 46 Mo. 555; *Timberman v. Craddock*, 70 Mo. 638; *Bell v. Kaiser*, 50 Mo. 150; *Goffe v. Gibson*, 18 Mo. App. 1; *Gaty v. Sack*, 19 Mo. App. 477.

IV.

The fact that the defendant did not know, at the time of making the sale to Shumaker, that the latter had been procured by the plaintiffs is immaterial. The right to a recovery by the plaintiffs depended upon the fact that they had procured the purchaser, and not upon the knowledge on the part of the defendant of that fact at the time of the sale. *Tyler v. Parr*, 52 Mo. 250; *Goffe v. Gibson*, 18 Mo. App. 4.

V.

We have omitted the consideration of an objection made to the instruction given for the plaintiffs, and we

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revert, in order to consider that objection, to the subject of the first paragraph of this opinion. Defendant's counsel state that it was contended, on the one hand, that the agent was instructed to sell the property for four thousand dollars, all cash, and, "on the other hand, that nothing at all was said about cash, or the terms of paying the purchase money." The counsel then urge, "that this sharp issue, the main one in the case, is wholly ignored" in the instruction given for the plaintiffs. We think that this is a mistake. In the plaintiffs' instruction, their right to a recovery is based upon the defendant's promise to pay them one hundred dollars "if they would find some person who would purchase the premises in proof at the price of four thousand dollars," and the fact that they found "such person ready and willing to purchase at that price." The defendant's side of the issue is not ignored, but the plaintiffs' right to a recovery is squarely based upon the jury finding in favor of their side of the issue. All doubt on the subject is removed by instruction "(*a*)" given on the court's own motion, which plainly tells the jury that, if they find that the defendant did instruct the agent to sell for cash at the time he employed plaintiffs, they should find for the defendant, if the plaintiffs "were unable to sell to Shumaker except for part cash and part credit." Under these instructions the jury must have understood the plain issue of fact. They could not have been misled. And their verdict must be considered as resting upon the finding by them of the issue in favor of the plaintiffs, because there is no pretense that Shumaker would pay all cash

VI.

In the light of the facts of this case, then, which are fixed by the verdict of the jury, and as to which there was no conflict of evidence, the case may be thus stated: The defendant employed the plaintiffs to sell his property at the price of four thousand dollars, on such

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terms as the defendant might name; the plaintiffs found Shumaker, who was ready, willing, and able to purchase at that price, on these terms, *i. e.*, fifteen hundred dollars cash, the balance in six months and one year; the defendant refused to sell on the terms proposed, and demanded all cash; the defendant's refusal and demand were reported to Shumaker, who at first declared that the defendant's course ended the matter, but who afterwards, either at the request of one of plaintiffs or with his knowledge and advice, called on the defendant in order himself to agree with him on terms; this visit to the defendant was made on the day after the negotiations began, and resulted in a sale by defendant to Shumaker on the terms first proposed by the latter with the addition of a provision that the defendant could have the unpaid part of the purchase money at any time before it was due that he should wish it.

Such being the case, in our opinion, the plaintiffs were entitled to recover, and the judgment was for the right party. The defendant was furnished by plaintiffs with a purchaser on terms agreeable to himself; and the brokers earn their commission.

Judgment affirmed. All concur.

JOHN E. MUIRHEAD, Respondent, v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, July 2, 1888.

CASE ADJUDGED—AFFIRMED ON EXAMINATION OF ALL THE OBJECTIONS. The court, after an examination of all the objections to the judgment in this case, comes to the conclusion that it should be affirmed; and Judge PHILIPS being of opinion that this decision, as well as a former one in this case, is in conflict with the decision of the Supreme Court of this state in the case of *Tabler v. Railroad*, 93 Mo. 79, growing out of the same accident, the cause is ordered to be certified to the Supreme Court.

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APPEAL from Linn Circuit Court, HON. G. D. BURGESS, Judge.

Affirmed.

Certified to Supreme Court.

The case is sufficiently stated in the opinion of the court.

STRONG & MOSMAN and VINTON PIKE, for the appellant.

I. The demurrer to the evidence should have been given. From the facts in proof, the jury could not infer that the disaster was occasioned by the use of a switch-rope coupling. *Powell v. Railroad*, 76 Mo. 80; *Randall v. Railroad*, 109 U. S. 478; *Stepp v. Railroad*, 85 Mo. 233.

II. The allegation is not that the negligence consisted in the use of a rope-coupling, but in coupling with a rope having an iron hook on the end, liable to drag and grapple the ties, etc. The court instructed that in this respect there was no evidence of negligence.

III. The charge in the petition is not that it was negligent to couple with a rope, but that it was negligent to couple with a rope having an iron hook on the end liable to drag, etc., etc. *Current case*, 86 Mo. 66; *Waldhier case*, 71 Mo. 516; *Balderson v. Railroad*, 49 Mich. 184; *Edens v. Railroad*, 72 Mo. 212.

IV. Plaintiff's second and third instructions are not warranted by the pleadings and evidence. They conflict with instructions given on motion of defendant. *Price case*, 72 Mo. 414; *Waldhier case*, 71 Mo. 516; *Current case*, 86 Mo. 66. And the second instruction ignores issues that should have been submitted and assumes disputed facts. It also makes the defendant responsible for the directions of a yardmaster and train dispatcher who are not shown to have represented the

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plaintiff; nor is it shown that they gave any directions concerning this train.

V. There was abundant evidence tending to show that the disaster was occasioned by the breaking of the track and defendant's ninth instruction should have been given. *Harris v. Railroad*, 89 Mo. 233.

VI. Defendant's fourth and twelfth instructions were the law and should have been given. *Porter v. Railroad*, 71 Mo. 67; *Covey v. Railroad*; *Holden v. Railroad*, 129 Mass. 268; *Railroad v. Duffy*, 35 Ark. 602.

VII. The court erred in refusing other instructions asked by defendants; they are supported by the evidence.

VIII. The remarks of counsel in his closing speech to the jury were improper and are grounds for a new trial. *Gibson v. Zeibig*, 24 Mo. App. 65.

No brief for the respondent.

ELLISON, J.—This case was heretofore in this court and is found reported in 19 Mo. App. 634. The facts, as to the principal points relative to the wreck, may be learned by reference to that report.

On the trial below, the issue of negligence was restricted, by an instruction, to the question, whether defendant was negligent in using a switch rope to couple the derrick car into the train. It is conceded there was no drawhead in the derrick car and that it was not coupled with an iron link, but was coupled into the train by means of a large rope. The court gave instructions for plaintiff and defendant which we think properly covered the case. Numbers four, nine, twelve, sixteen, seventeen, eighteen, and nineteen offered by defendant were refused. We will not set them out, as they are of some length, but rest content with the statement that they were either not correct as applied to the case or were covered by those already given. There was a demurrer to the testimony at the close of plaintiff's case

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and afterwards at the close of the whole case. Both were refused and we think properly.

One ground of the motion for new trial is, that counsel for plaintiff, in his address to the jury, during the temporary absence of the judge, said that others had recovered judgment for injury in the same accident and had gotten their money and that "This case is the last of the Mohicans." It does not appear that objection was made to this. The court's attention was not called to it, so that, if considered necessary, action on the court's part might have been taken in regard thereto.

An examination of all the objections made to the judgment leads us to the conclusion that it should be affirmed and it is so ordered. HALL, J., concurs.

PHILIPS, P. J.—Without expressing any opinion upon the merits of the question involved, arising on the instructions in this case, it is enough to say, since the first opinion of this court herein was delivered the Supreme Court has decided the case of *Tabler v. H. & St. J. Ry. Co.*, 93 Mo. 79, growing out of the same accident; which decision is apparently in conflict with the view taken by this court in its two opinions. For this reason the cause will have to be certified to the Supreme Court, which is accordingly so ordered.

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ADOLPH TURNER, by next friend, Appellant, v. SIMON BONDALIER *et al.*, Respondents.

Kansas City Court of Appeals, July 2, 1888.

1. INFANT—POWER TO APPOINT AGENT TO MAKE AFFIDAVIT IN ACTION OF REPLEVIN.—The appointment of an agent by an infant by power of attorney is void. So an appointment by an infant of an attorney for the purpose of indorsing a note is void, whether it be by warrant of attorney or by parol. So an appointment by an infant to confess judgment is void, or to deliver property for him,—to render it voidable merely he must deliver manually. So his appointment of an agent to contract for him is void, nor can he ratify such act. An agent ought necessarily to have a principal who is *sui juris*. *Held*, therefore, that an infant, without the interposition of a next friend or guardian, cannot appoint an agent to make affidavit to his statement in replevin.

2. REPLEVIN—AMENDMENT OF STATEMENT WITHOUT AFFIDAVIT ON APPEAL TO CIRCUIT COURT.—Section 3060, Revised Statutes, provides that "the statement of plaintiff's cause of action * * * may be amended upon appeal in the appellate court, to supply any deficiency or omission therein," etc. And this section has been held to apply to deficiences or omissions which were jurisdictional. (*Mitchell v. Railroad*, 82 Mo. 108). But in this case, it is not a deficiency or omission in the statement, which is to be supplied by amendment, but it is adding an affidavit on appeal, which is required before the issue of process. This could not be supplied in the circuit court.

APPEAL from Cole Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

Motion for rehearing denied.

The case is stated in the opinion.

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McINTYRE & WAGNER and W. S. POPE, for the appellants.

I. The statement and affidavit filed before the justice was sufficient. The affidavit could be made by an agent. Rev. Stat., sec. 2882; *Johnson v. Mason*, 16 Mo. App. 273.

II. The omission to state that the property had been injured, how and in what manner, was an immaterial omission. It was not a jurisdictional fact necessary to be stated. *Reigert v. Voelker*, 6 Mo. App. 53; *Berry v. Kaufman*, 70 Mo. 187.

III. The court erred in not permitting the plaintiff, at least to file the amended statement and affidavit which he offered to file. Rev. Stat., sec. 3060; *Gregory v. Railroad*, 20 Mo. App. 451; *Butts v. Phelps*, 79 Mo. 303; *King v. Railroad*, 79 Mo. 329; *Mitchel v. Railroad*, 82 Mo. 108; *Minter v. Railroad*, 82 Mo. 129; *Davis v. Ritchie*, 85 Mo. 501; *Manz v. Railroad*, 87 Mo. 280; *Vaughn v. Railroad*, 17 Mo. App. 8; *Wood v. Railroad*, 20 Mo. App. 600; *Shaffner v. Leahy*, 21 Mo. App. 113; *Newberger v. Friede*, 23 Mo. App. 639; *Rathburn v. Teeter*, 25 Mo. App. 284; *McMurry v. Martin*, 26 Mo. App. 437.

EDWARDS & DAVISON, for the respondent.

I. The court will observe that the transcript of the record in this case utterly fails to show for what reasons the circuit court refused to permit the plaintiff to amend. The bill of exceptions must show the rulings of the court and the errors complained of, which is not done in this case. This is fatal to the point raised here by appellant that the court erred in refusing to allow the filing of the amended statement. *State v. Gee*, 79 Mo. 313, and authorities cited. This court cannot and will not presume that the refusal to permit the plaintiff to amend was for the reasons assigned in the argument of appellant. The presumptions are always in favor of the judgment of the court.

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II. The amended statement offered to be filed in this case is not sworn to by S. D. Turner, the next friend of plaintiff, but by an outside party who had not been appointed by the court. This could not be done, and gives no force or validity to the affidavit. Rev. Stat., secs. 2905, 2906. This suit could not be commenced by an infant without the appointment of a next friend, and that must be done by the court. This suit could not be commenced by an infant, as it was necessary to be sworn to by his agent or next friend, and the infant could neither appoint an agent or next friend, and, therefore, the affidavit of S. D. Turner to the statement was a nullity.

III. The complaint filed before the justice was insufficient and stated no cause of action under the statute. *Gist v. Loring*, 60 Mo. 487; *State ex rel. v. Dunn*, 60 Mo. 70; *Madkins v. Trice*, 65 Mo. 656; Rev. Stat., secs. 2882, 2883; *Frederick v. Tiffen*, 22 Mo. App. 443.

IV. The statement of plaintiff as filed before the justice failing to state a cause of action, could not be amended in the circuit court. Authorities *supra*.

V. The action of the court in refusing to permit the plaintiff to file an amended statement, sustaining the motion to dismiss, and dismissing the suit, was correct under the decisions of the Supreme Court and the statute. Authorities *supra*. Amendments should not be allowed. Rev. Stat., secs. 2882, 2883. Section 3060 has no application to amendments in proceedings by replevin. One of the necessary averments necessary to be made in an action of replevin is that the property has been injured—state how and in what manner, and that for the taking and detention of said property and all injuries thereto plaintiff is damaged in. Rev. Stat., secs. 2882, 2883. The statute of replevin in justices' courts is unlike the statute in regard to attachments. In the latter case the law expressly allows amendments to be made. Rev. Stat., sec. 445. The amendment offered to be made was improper, because it brought a new item

or cause of action not embraced in the original statement, which is expressly prohibited by the section (Rev. Stat., sec. 3060) upon which the plaintiff relied for his amendment.

ELLISON, J.—This is an action of replevin. The plaintiff is a minor, and in the statement filed with the justice of the peace before whom the case originated, he asked the appointment of "a next friend." Such appointment was made, on the day of trial.

On appeal to the circuit court, defendants filed a motion to dismiss the action; pending this motion, plaintiff asked leave to file an amended statement, which was refused, and the motion to dismiss sustained. Judgment was then rendered for defendants, and plaintiff's motion to set the same aside having been overruled, he appealed to this court.

The objection to the original statement was that it failed to state, as required by sections 2882, 2883, Revised Statutes, that the property had been injured, or how, or in what manner, injured. Also, that the affidavit was made by an agent of the minor plaintiff, and not by his next friend. The affidavit was by "S. D. Turner, agent for Adolphus Turner, plaintiff."

I. The statute permits the affidavit to be made by the "plaintiff, his agent, or his attorney." The question is thus presented, whether an infant plaintiff, without the interposition of a next friend or guardian, can appoint an agent to make affidavit to his statement in replevin. What acts of an infant are void, and what merely voidable, has been a prolific theme for discussion by the courts of this country, and about which there is diversity of opinion. But it is held, with substantial unanimity, that the appointment of an agent by an infant by power of attorney is void. *Dexter v. Hall*, 15 Wall. 9, 26; *Lawrence v. McArter*, 10 Ohio, 38; *Pyle v. Cravens*, 4 Litt. [Ky.] 17; *Trueblood v. Trueblood*, 8 Ind. 195; *Fonda v. VanHome*, 15 Wend. 631; *Stafford v. Roof*, 9 Cowen, 626; *Bennett v. Davis*, 6 Cowen, 393;

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Knox v. Flack, 22 Pa. St. 337; *Armitage v. Widoe*, 36 Mich. 124; *Semple v. Morrison*, 7 Monroe, 298. In *Dexter v. Hall, supra*, Strong, J., says: "Yet it is universally held, as laid down by Lord Mansfield, in *Zouch v. Parsons*, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined that a power of attorney made by an infant is void. So it has been decided in Ohio, in Kentucky, in Massachusetts, and in New York. In fact, we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable."

And such appointment of an attorney for the purpose of endorsing a note is void whether it be by warrant of attorney or by parol. *Semple v. Morrison, supra.* A warrant of attorney by infant to confess judgment is void. *Bennett v. Davis, supra; Knox v. Flack, supra.* An infant's appointment of an attorney or agent to deliver property for him is void; to render it voidable merely, he must deliver manually. *Stafford v. Roof, supra.* His appointment of an agent to contract for him is void. Nor can he ratify such act. "He cannot affirm what he could not authorize." Cooley, Ch. J., in *Armitage v. Widoe, supra.* To same effect is *Trueblood v. Trueblood, supra.*

It seems that those acts and contracts which an infant may do or make, and which he can affirm or disaffirm, are such as are done or made by himself directly, and not removed by delegation to an agency which in itself is not binding on the infant. An agent ought necessarily to have a principal who is *sui juris.*

It is said in 1 American Leading Cases, 247, that such personal and discretionary legal capacity as an infant is vested with is, therefore, in its nature, incapable of delegation. And the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct logical necessity of that principle.

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There are two cases (*Hardy v. Waters*, 38 Maine, 450, and *Hastings v. Dollarhide*, 24 Cal. 195), which are not in accord with other authority on this question, but it is not believed the authorities cited in those cases sustain their assertions. But be that as it may, there is another consideration which is, to my mind, conclusive of this question. The affidavit is necessary to confer authority on the justice to issue process in the cause. The act of an infant in appointing an agent, if we should concede it was not absolutely void, is voidable at his election. So then if we should hold the affidavit of the agent sufficient, we would say that jurisdiction does or does not rest with the justice as the caprice of the infant may say. The jurisdiction of a court ought not to depend on such contingency.

II. It appears from the foregoing that the statement stood at the time process was issued and when the case was taken to the circuit court, without an affidavit, and the remaining question is, not strictly whether the affidavit can be amended, but can a statement in replevin without an affidavit, be verified on appeal to the circuit court.

Section 3060, Revised Statutes, 1879, provides that, "the statement of plaintiff's cause of action * * * may be amended upon appeal in the appellate court, to supply any deficiency or omission therein," etc. And this section has been held to apply to deficiencies or omissions which were jurisdictional. *Mitchell v. Railroad*, 82 Mo. 108; *Vaughn v. Railroad*, 17 Mo. App. 8. But in the case before us, it is not a deficiency or omission in the statement which is to be supplied by amendment, but it is adding an affidavit on appeal which is required before the issue of process. In my opinion it could not be supplied in the circuit court.

This disposition of the case renders it unnecessary to notice other contested points. The judgment is affirmed. All concur.

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LIBBIE KEHOE, Respondent, v. EDWARD G. TAYLOR *et al.*, Appellants.

Kansas City Court of Appeals, July 2, 1888.

1. PRACTICE—DECREE IN CHANCERY—REVIEW OF ON APPEAL.—It is not necessary to the validity of a decree, in chancery, that there should be any special finding of facts by the court. If this court, on review, should find the essential facts to exist, it would not be bound by the findings of the trial court in a chancery case; and again, if the facts found by the trial court be sufficient to warrant the decree under the pleadings, the judgment would still stand.

2. ——— PROOF OF ALL AVERMENTS NOT ALWAYS ESSENTIAL TO RECOVERY—RULE CONCERNING.—It is a well-recognized rule of practice that every averment, even of material matter, need not be proved. If there be sufficient proof of the remaining substantive allegations constitutive of a cause of action, the ends of the law are attained. But if the bill alleges a case of fraud, and the title to relief rests upon the fraud only, the bill will be dismissed if the fraud as alleged be not proved; but if it rests also upon other matters which are sufficient to give the court jurisdiction and these are proved, relief will be given in respect of so much of the bill as is proved.

3. FRAUD—WHAT CONSTITUTES IT, IN CONTEMPLATION OF COURTS OF EQUITY.—Fraud, in the contemplation of a court of equity, may be said to include properly, all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another; or by which an undue or unconscientious advantage is taken of another.

4. ASSIGNMENT—POSITION OF ASSIGNEE IN—DUTIES TO CREDITORS AND ASSIGNOR.—The assignee, in an assignment, is the trustee for both the debtor and creditors, to see that the trust property is so administered as to secure to the creditors, as far as possible, their just claims, and then to account to the debtor for any surplus. His office as assignee is wholly incompatible with that of an attorney for the assignor or the creditors, and such fact would justify his removal if brought to the court's attention having jurisdiction over the assignment proceedings.

APPEAL from Clay Circuit Court, HON. THOMAS E. TURNEY, Special Judge.

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Affirmed.

Motion for rehearing denied.

Statement of case by the court.

This is a suit in equity by a creditor against an assignee of an insolvent estate. The petition, substantially, alleges, that on ——— day of January, 1882, one Rufus Suits being insolvent made an assignment to the defendant Taylor for the benefit of creditors. Taylor duly qualified and entered upon the duties of his office. It charges that at the time aforesaid, Taylor and his co-defendant Scott were engaged as partners in the practice of law; that they were acting as the counsel and attorneys of said Suits, and so continued to act throughout the administration of the estate, with the understanding between them that they were to share as partners in all fees to be charged against said Suits, and in the fees of the assignee; that at the time of said assignment Suits was owing the plaintiff a debt, evidenced by a note, for the sum of $736.75; also was indebted to his wife Elizabeth Suits, in the sum of twenty-one hundred and fifty dollars, evidenced by a note, and to his daughter Carrie Suits in the sum of five hundred dollars, evidenced by a note, with a credit thereon of four hundred dollars. The petition then charges that the said creditors authorized said Suits to have their claims allowed by the assignee; that the assignee did allow said claims, but fraudulently and wrongfully made the allowance in the name of his partner Scott, for the purpose of enabling said Scott to collect the dividends arising thereon, and applying the same to the use of the assignee and said Scott; that said claims were so allowed without any authority whatever from the said creditors, and without their knowledge or consent; that they supposed until long thereafter that the claims were allowed in their own names. It is further charged that the assignee had declared two dividends on

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said allowance, one for thirty per cent. and the other for seven per cent. of the principal sums, as shown by the term reports of the assignee; that plaintiff does not know whether said dividends have been paid over to said Scott, but if they have been it was fraudulently done, etc., to enable said assignee to obtain credit therefor in his settlement with the court. The claims of said Elizabeth and Carrie Suits were assigned to plaintiff for the purpose of enabling her to join all of said claims in one action. The petition prays for an accounting by defendants, and for judgment for the amount of said dividends.

The answer tendered the general issue.

Plaintiff's evidence tended to sustain the allegations of the petition so far as the facts are concerned respecting the assignment, and the indebtedness of said Suits, and the allowance by Taylor of the said claims in the name of Scott. There was sufficient evidence to justify Suits in presenting for the claimants their demands for allowance; but there was no evidence before the assignee, or the trial court, to justify the inference that the parties authorized the allowances to be made in the name of Scott. Nor did they in fact ascertain that the claims had been so allowed until long thereafter. The notes held by the creditors were never presented to the assignee but in fact remained all the time in their possession. The evidence further showed that Scott and Taylor were partners as charged, and that they were counsel for the assignor, and were to share equally in the fees arising therefrom as well as in the fees of the assignee. The appraised value of the assets inventoried by the assignee amounted to $10,472.84. Taylor took charge of the stock of goods, and proceeded to sell privately until he had realized about $5,011.84. He then, at the instance of Suits, sold the remainder in a lump to one Saltsman, a relative of Suits, for the sum of sixty-four hundred dollars, and he collected on accounts $721.24. As shown by the last term reports made to the court by Taylor, there was in his hands

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at the time this action was brought a balance of $2,057.07, after paying out all dividends.

The evidence on the part of the defendant Taylor tended to show that it was the expectation that Suits would soon make a compromise with his creditors in the east, and obtain control of the goods. To this end the sale was made to Saltsman, which was merely colorable, for the benefit of Mrs. Suits. Scott then went east to see said creditors, and succeeded in effecting a settlement with them. The money with which he made these adjustments was furnished him by Mrs. Suits, to the amount of four thousand dollars, and the balance was furnished by Taylor out of the monies in his hands as assignee. Taylor testified that Scott took the assignment of the claims so compromised by him in his (Scott's) name, and then had them allowed by Taylor against the estate in the name of Scott; that this was done to protect the assignee and Scott for the money so advanced by the assignee, and for their fees. Taylor gives as a reason for allowing the claims of plaintiff, Mrs. Suits and Carrie, in the name of Scott, that he understood from Suits that it was to be done in that way, as Suits was to pay these debts when he got control of the property, as he regarded them as debts of honor. He took from Scott receipts for the dividends on all the claims so allowed in Scott's name, though in fact no money passed. He accounts for the balance of money in his hands, as shown by his last term report, by crediting it with the amount of Scott's expenses in effecting the compromise with the eastern creditors, $209.50, and five hundred dollars, fee charged Suits for effecting said compromise, etc. The assignee also claimed a fee of one thousand dollars for his services.

The evidence also showed that one Henry Smith was a creditor of said estate, whose claim was allowed by Taylor. Taylor claimed that Suits was to settle this claim of Smith after he got the goods back. This Suits denied, and refused to so do. Thereupon Taylor induced Smith to bring an action by attachment against

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the goods so bought in by Saltsman, in which Mrs. Suits interpleaded, and the issues therein were determined in her favor. Thereupon Taylor had to pay to Smith his dividend out of the monies in his hands. And as he had given an indemnifying bond to the sheriff in making said levy, he became bound for the costs therein, which he paid. So he claims that after paying out these sums he in fact had left in his hands no money belonging to the estate; and that any dividend he may be required to pay over to these claimants would come out of his own pocket.

There was other evidence bearing upon the conduct of Scott in this matter, and the manner of managing this estate; but the foregoing are the important facts. Scott did not testify in the case.

The court made decree as follows: The court finds that the plaintiff Libbie Kehoe, was the owner of the notes as described as hers in the petition, and that the fact was known to the defendant, the assignee, at the time the notes were allowed in the name of the defendant Scott. That the allowance was made in the name of Scott without authority from plaintiff, without her knowledge, and without negligence on her part. That the allowance was so made through the culpable negligence of the assignee and in violation of his duties as such. It is, therefore, ordered that the assignee pay to the plaintiff the dividends of thirty and seven per cent. on said allowances, with interest at the rate of six per cent. per annum from the institution of this suit, and if any receipts for said dividends, or any part of them, have been given by the defendant Scott, the same are declared void and cancelled. That the allowance on the notes be transferred by the defendant Scott to the plaintiff. The court finds that Elizabeth Suits is the owner of the allowances made on notes alleged in the petition to be hers. That she knew of and acquiesced in the use by the assignee of the money actually received by him as assignee in the settlement of the debts owing by her husband in New

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York and Chicago, and is not entitled to any relief against the assignee. That Carrie Suits is the owner of the allowance of one hundred dollars. That the plaintiff, as the trustee of an express trust, was authorized to sue for the claims of Elizabeth and Carrie Suits, and the defendant Scott is ordered to transfer to her the allowance herein found to belong to them, the said Elizabeth and Carrie Suits.

T. S. B. SLAUGHTER and WASH ADAMS, for the appellants.

I. When fraud is alleged it must be clearly and distinctly proved as alleged. Bump's Kerr on Fraud and Mistake, 382; *Schields v. Hickey*, 26 Mo. App. 194; *Muenks v. Bunch*, 90 Mo. 500; *Priest v. Way*, 87 Mo. 16; *Lexox v. Harrison*, 88 Mo. 491; *Scheppelman v. Feurth*, 87 Mo. 351.

II. The assignee can only allow such claims as are presented to him at the proper time and place. He acts in that regard in a judicial capacity, and his decisions are final unless appealed from. Rev. Stat., 1879, secs. 373, 376; *Building Association v. Zoll*, 83 Mo. 95; *Eppright v. Kauffman's Adm'r*, 90 Mo. 25. If the proof shows a state of facts inconsistent with the charge of fraud, the findings should be for defendants. *Priest v. Way*, 87 Mo. 16. Plaintiff is only entitled to relief upon the facts proved when those facts are based upon the petition. *Muenks v. Bunch*, 90 Mo. 500; *Dunn v. White, Adm'r*, 63 Mo. 181. To warrant a recovery on the charge of fraud there must be a concurrence of both fraud and injury. *Lenox v. Harrison*, 88 Mo. 491; *Dormitzer v. Greves*, 3 Mo. App. 593. If Suits was plaintiff's agent, and authorized her claim to be allowed in a manner not directed by her, and the defendants were innocent, she should suffer the loss, if any, not they. Story on Agency [8 Ed.] sec. 127.

III. Fraud will not be assumed. *Funkhouser v. Lay*, 78 Mo. 458. "The legal presumption always is

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that a trustee has faithfully executed his trust, unless the contrary is fully and satisfactorily evinced." Burrill on Assignments [4 Ed.] sec. 462. Reasonable diligence was not shown. *Chamberlin v. Peltz*, 1 Mo. App. 183.

Dobson, Douglass & Trimble, for the respondent.

I. If the bill alleges a case of fraud and the title to relief rests upon that fraud only, the bill will be dismissed if the fraud, as alleged, is not proved. But if the case does not entirely rest upon the proof of fraud, but rests also upon other matters, which are sufficient to give the court jurisdiction, and the case of fraud is not proved, but the other matters are proved, relief will be given in respect of so much of the bill as is proved. Bump's Kerr on Fraud, 383. But the proof of conspiracy and actual fraud, if necessary to be proved, are established by the evidence and the record before the court. The rules of evidence are the same in equity as at law. Whether certain facts, as proved, constitute a fraud is a question for the court; and it does not have to be proved by affirmative, direct, or positive proof. Fraud is not to be considered as a single fact, but a conclusion to be drawn from all the circumstances of the case. Bump's Kerr on Fraud and Mistake, 383; *Braden v. Walker*, 2 Harr. & J. 285; *Muenks v. Bunch*, 90 Mo. 500; *Frederick v. Allgaier*, 88 Mo. 598. The fact that the defendants did what the proof shows they did, whether from ignorance, or a previous agreement, or "conspiracy," to do it, or simply to satisfy the itching of prehensible palms, makes no manner of difference to the plaintiff, or to a court of equity. Her dividends were absorbed by another, and she had, by means of the peculiar and unheard of course adopted by the defendants, no remedy at law. When the facts are told to a court of equity it is its duty and high privilege to interfere and grant relief. 1 Story's Eq. Jur. [11 Ed.] sec. 333.

II. It devolves upon the defendants to show, by

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satisfactory proof, that they had authority for having the accounts allowed in Scott's name, and for accounting to him for the dividends.

III. The point is made for the appellants that the respondent was negligent in not presenting her own claim for allowance before the assignee, and also that if she did not authorize Suits, or any one else, to have it allowed at all, she has no right to the allowance in Scott's favor, based upon her notes. But there is a tolerably ancient maxim of the law, to the effect that a man cannot take advantage of his own wrong. It does not lie in the mouths of these defendants to make any such objection. If the claims were wrongfully or illegally allowed in Scott's name instead of the true owners, they have a right to the fruits of such allowances, even if they never authorized their allowance in any manner, or even if they never knew there was an assignment.

IV. It was also attempted to be shown that there is no money in his, Taylor's, hands as assignee, but this claim is not only contradicted by the records he made in the circuit court, but by his own evidence, and that, too, allowing him to account to Suits individually for moneys received and disbursed and contradicting his sworn reports to the circuit court. By his fourth and fifth term reports there was, and still is, a balance in his hands of $2,057.07. The last report is made May 5, 1885, long after this suit was begun and after the payment of dividends on all claims allowed, including payments to Scott of about one thousand dollars on the three claims in controversy here, which would really make still in the defendants' hands about three thousand dollars, belonging to the assigned estate, unless the record made in the circuit court and sworn to as true, is false throughout. But if it were true, as asserted, that there was no money in Taylor's hands, it is because it was misappropriated. But we contend that the defendants cannot be heard in this case, upon the pleadings, or upon the facts, to contradict, or in any way impeach, the records made by them in the circuit court under the

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oath of the defendant Taylor. *Peters v. Clendenis*, 12 Mo. App. 521.

V. But even to go behind the record made by Taylor, upon which he will ultimately have to settle in the circuit court, his own evidence shows that at the time he was called upon to settle these claims there was over fifteen hundred dollars of the assigned estate in his and Scott's hands. It appears from the evidence that in order to try to force such a settlement with Suits as the defendants wanted, they induced some creditors of his to levy their writs of attachment and execution upon the stock of goods which had been bought and paid for by Mrs. Suits and was in her possession, and they indemnified the sheriff for making such a levy. That Mrs. Suits sued the sheriff and recovered the value of her goods, and the defendants claim they had to pay the costs and a deficit between the judgment of Mrs. Suits and the amount her goods sold for, amounting to seven or eight hundred dollars, and they plead that payment as an extenuating circumstance in their favor. This plea is not valid

PHILIPS, P. J.—It is urged against the decree that it does not find the existence of the fraudulent conspiracy alleged in the petition, nor the fraudulent act charged against defendants in appropriating the proceeds of the dividends on the claims in question.

It was not necessary to the validity of the decree that there should have been any special finding of the facts by the court. If this court on review should find the essential facts to exist we would not be bound by the findings of the lower court in a chancery case. And again, if the facts found by the court be sufficient to warrant the decree under the pleadings the judgment would still stand.

It may be conceded to defendants that the evidence in the case may not have been sufficient to justify the court in finding that there was any actual conspiracy between defendants at the inception of this transaction

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to obtain control of plaintiff's claims, and to parcel out the dividends among themselves. And if the existence of such facts were essential to maintain the decree it would fail. But it is a well-recognized rule of practice that every averment, even of material matter, need not be proved. If there be sufficient proof of the remaining substantive allegations constitutive of a cause of action the ends of the law are attained. *Wright v. McPike*, 70 Mo. 176; *Noffsinger v. Bailey*, 72 Mo. 216; *Gaty v. Sack*, 19 Mo. App. 477. So Kerr on Fraud and Mistakes, p. 383, lays down the rule as follows: "If the bill alleges a case of fraud, and the title to relief rests upon the fraud only, the bill will be dismissed, if the fraud as alleged be not proved. It cannot be allowed to be used for any secondary purpose. But if the case does not entirely rest upon the proof of fraud, but rests also upon other matters, which are sufficient to give the court jurisdiction, and the case of fraud is not proved, but the other matters are proved, relief will be given in respect of so much of the bill as is proved."

The substantive facts charged in the petition, omitting the word "fraudulently," are that said allowances were made by Taylor wrongfully, and without any authority whatever from the claimants, and without their knowledge or consent; and that by reason of defendants' misconduct in the matter plaintiff will lose her rightful dividend unless equity comes to her relief. Professor Tucker in his notes, after speaking of the impossibility of courts of equity laying down any definite boundary lines within which fraud may be found, as it is so infinite in its ramifications and devices, says: "All surprise, trick, cunning, dissembling, and any unfair way by which another is cheated, is fraud." So Kerr on Fraud, etc., pp. 42, 43, says: "Fraud in the contemplation of a court of equity, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another; or by which an undue or unconscientious

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advantage is taken of another. * * * Courts of equity do not affect to consider fraud in the light of a crime; it is not their province to punish, nor have they any censorial authority."

The facts in this case certainly involve a breach of duty in administering a trust fund, injurious to another, and which if permitted to go uncorrected would give the wrong-doer an unconscionable advantage over the party his misconduct wronged.

When the defendant Taylor took upon himself the office of an assignee the law stepped forward and clothed him with an express trust. He then became the minister of justice—to administer the estate coming into his hands precisely as the law directed, and not otherwise. He was the trustee for both the debtor and the creditors, to see that the trust property was so administered as to secure to the creditors, as far as possible, their just claims, and then to account to the debtor for any surplus.

It, therefore, becomes at once apparent that his office as such assignee was wholly incompatible with that of an attorney for the assignor or the creditors. In the allowance of claims against the estate he acted in a *quasi*-judicial capacity. He could not act either for the debtor or claimant. Yet the proof is, that the assignee and his co-defendant were attorneys throughout for the debtor, and their continued partnership extended to a division of the fees for the services rendered as attorneys to the debtor, and in the fees coming to the assignee. This dual position concerned him too much in the interest of the debtor, and the amount of fees that might be got out of him in the event the estate went back to him, after coercing settlements with the creditors, with consequent neglect of the rights and interests of the creditors. Such facts, if brought to the attention of the circuit court, having jurisdiction over the assignment proceedings, would have justified the immediate removal of the assignee. He sat as judge in allowing claims against the estate, and permitted his partner to

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take judgment of allowance in his own name, without the notes of the claimants being brought into court, nor any legal evidence whatever of any authority to Scott to so have them allowed. And without the knowledge or consent of the owners of the notes, he paid over their dividends, nominally, to Scott. His only claim of authority for this proceeding is that he understood from Suits, the assignor, that he was authorized to so have the same done. Suits denies that he gave him any such authority, or that he had any such direction or permission from the holders of the notes. At his peril the assignee had to be satisfied of two facts, first, that Suits had any delegated power whatever from the principals, and second, that Suits was acting within the scope of his imputed agency. As a lawyer he knew that an agency could not be established by the mere declarations or acts of the imputed agent. *Anderson v. Volmer*, 83 Mo. 406. The burden of proving such agency rested on the defendant. *Craven v. Gilliland*, 63 Mo. 28.

Without inquiry of the known interested parties, he acted upon the faith of what Suits said, or on what he understood would be the issue of the assignment proceedings, if his partner succeeded on his end of the line in effecting compromises, and Suits should regain control of the goods, and resume business. Having departed from the plain and known path of the law in administering his office of trustee, in reliance upon the integrity of the assignor, by which defendants were to realize large expected compensation, they should look to the man whom they claim to have been acting for and trusting; and not ask that the innocent plaintiff bear the loss of their palpable breach of duty. The danger of loss to which defendants' misconduct has exposed these unoffending claimants is sufficient to call into activity the powers of a court of equity, as without its interposition the plaintiff is without redress.

Had the assignee proceeded as the obligations of his undertaking required, he would have had ample assets

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in his hands to pay the claims in question, to the exten. of the dividends allowed by him. The money he expended in costs in the attachment suit of Smith he can claim no credit for. As assignee he had nothing to do with the payment of fees against the assignor, their client. That was the individual debt of Suits. And even allowing the assignee a liberal compensation for his services as such assignee there was sufficient assets in his hands to pay the two dividends directed by the decree of the circuit court. If either he or the plaintiff is to suffer loss through his dealing with Suits rather than with the circuit court in administering the estate, it should be he who trusted to Suits, and the success of the scheme of an outside settlement.

It does not lie with defendants to tread back upon their own tracks by saying the allowance of the claims in the name of Scott being unauthorized, there is in fact no allowance of plaintiff's and Carrie Suits' claims which he can be compelled to pay. He made the allowances, and claimed settlement accordingly with the term court, while the plaintiff and Carrie were living under the impression that their claims were properly allowed; and equity says no man shall be permitted to take advantage of his own wrong.

The whole trouble with the defendant Taylor, so far as he is concerned in this transaction, is, that he permitted himself to be improperly used by his partner and Suits, no doubt with the honest expectation that all would be fair in the sequel; but the law, in the spirit of equity, demands that he shall not injure the innocent, whereby the least advantage shall accrue to himself.

The judgment of the circuit court must stand affirmed. It is so ordered. All concur.

On motion for rehearing.

Per Curiam.—It is insisted in the motion for rehearing that the opinion herein is inconsistent with itself, in that it makes defendant answerable for the loss

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of plaintiff's claim for having improperly and without authority, allowed it in the name of Scott; and that this position necessarily rests upon the idea that defendant had no authority whatever from plaintiff in the matter of allowing her claim. Hence, they argue, that plaintiff's claim was either allowed or it was not allowed; that the same argument which repudiates the act of the assignee in allowing the claim in the name of Scott would also repudiate its allowance at all; and as defendants cannot be held to account for a claim not presented and allowed, the logical result of the court's opinion must be to acquit defendants of any responsibility.

The premise assumed is false. As the opinion states, there was sufficient evidence to warrant the conclusion that Suits had authority from plaintiff to have her claim allowed. This was a limited, not a general agency. It carried with it all the power essential to accomplish the purpose desired by the principal, but nothing more. It did not authorize Suits to have the claim allowed in the name of anybody else. She had done nothing to indicate to the assignee that Suits was her general agent. There was no "holding out" by the principal to impress a third party with the belief that Suits was her general agent. The only evidence defendant had, as claimed by himself, was the naked statement of Suits. He was guilty, to say the least, of inexcusable negligence in thus allowing the claim, known to belong to the plaintiff, in the name of a third party, without the production of the note, or any evidence of an assignment, power of attorney, or other written authority from the known principal. Suits did have an agency, as the proof shows, to have the claim allowed. That was sufficient to authorize defendant Taylor to allow it in her name. When he went further and allowed it in the name of his partner, it was without authority, based solely upon what the limited agent said, with nothing in the conduct or acts of the principal to justify him in believing that Suits had a general

agency. On the contrary, the fact that Suits asked to have the claim of his principal allowed in the name of a third party, in the absence of the note, should have excited the suspicion of one sitting in judgment. The repudiation of the unwarranted act in allowing the claim in the name of Scott, does not, in equity, carry with it the result of a claim not allowed at all. The claim was presented and allowed, but in the name of a wrong party, under circumstances of culpability. Equity, which looks to substance and not to form, interposes and says, that allowance, as against the wrong-doers, shall enure to the benefit of the rightful party. It shall' stand, but the apparent beneficiary shall reap nothing from it. The rightful party shall be substituted, and receive the dividend declared in favor of Scott.

Again, when the assignee allowed the note in favor of Scott, which was *prima facie* due to and owned by plaintiff, the burden of proof rested upon the assignee to show his warrant for this act. The only evidence offered by him was his own testimony, that Suits told him to so allow it. This Suits denied, and testified that he did not tell the assignee to allow the claim in Scott's name. It is evident from the decree of the trial court that it found this issue against defendant. It is the recognized rule of this court, even in an equity proceeding, to defer to the conclusion of the trial court on a disputed question of fact arising on conflict of testimony.

We are unable to perceive from the record any conduct on the part of the plaintiff calculated to encourage the belief on the part of the assignee that she authorized the allowance of her note in the name of Scott. If she loses her claim, it will be through the wrongful act of defendants. The defendants can reap no benefit from their own wrong; and a court of equity will place the injured party where defendants' breach of duty has sought to displace her.

The motion is denied.

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PHILANDER ATTERBERRY *et al.*, Appellants, v. WILLIAM D. McDUFFEE, Executor, Respondent.

Kansas City Court of Appeals, July 2, 1888.

1. **ADMINISTRATION—LIABILITY OF EXECUTORS, ETC., FOR CARE—MEASURE OF.—Executors and administrators stand in the position of trustees and are liable only for want of due care and skill; and the measure of care and skill required of them is the same as that demanded of bailees for hire, viz., that which prudent men exercise in the direction of their affairs; the care must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility of its being stolen and the temptations thereto.**

2. **—— DEPOSIT IN BANK—FORM OF.—A *bona-fide* deposit of trust funds in a bank, in the trustee's own name, it being clearly shown that it was trust funds, will protect him against loss, which occurs not on account of the form of the deposit, but by the destruction or failure of the bank. It is different where there has been a mingling of the trust fund with the individual money of the trustee.**

APPEAL from Macon Circuit Court, HON. ANDREW ELLISON, Judge.

Affirmed.

Statement of case by the court.

This controversy grows out of objections made by heirs to certain credits asked by an executor in his final settlement. The credits are stated as follows: "This executor claims the following additional credits occasioned by loss of money deposited in Macon Savings Bank in the ordinary course of business, for safe keeping, and convenience in use, said bank at said time being in good repute for solvency, and fully trusted and used by the general community: March, 1881—By amount deposited in said bank, $340.00; Oct. 1—By amount deposited in said bank, $523.00. At the time of the

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failure of said bank, February 15, 1882, there remained of said sums in said bank, not drawn out and used, the sum of $463.80. Since said failure this executor has received two dividends on said sums amounting to $62.88, leaving a balance in bank of $420.82."

The evidence discloses the following facts, substantially: J. M. Farmer died testate in 1880,—appointing Wm. D. McDuffee executor of his will. The executor qualified and took charge of the estate in November, 1880. The executor lived in the country, about fifteen miles from Macon City, which city seems to have been the point at which he transacted his business; and the Macon Savings Bank was regarded as the most trustworthy bank in the community.

In February, 1881, the executor, under a power granted by the will, sold a tract of land to one Nancy J. Farmer for the sum of thirteen hundred dollars. Mrs. Farmer held a certificate of deposit in said bank for a larger sum of money. The parties to said sale went to the bank, and, by agreement, the cashier of the bank debited Mrs. Farmer's certificate with thirteen hundred dollars, and issued a certificate to the executor for that amount due in thirty days. On the next day the executor obtained from the probate court an order of distribution among the legatees of the estate, for the sum of nine hundred and sixty dollars, which he had the bank pay over to the heirs out of the thirteen hundred dollars. Whereupon McDuffee handed his certificate to the bank cashier, and told him to cancel it, and issue him a certificate as executor for the balance, which was three hundred and forty dollars. Melone, the cashier, handed him a certificate therefor, which McDuffee put in his pocket-book without examining, supposing, as he testified, that it was properly drawn to him as executor. The evidence shows that the executor was anxious to distribute the money among the distributees as rapidly as possible, and again, in May, 1881, applied to the probate court for another order of distribution. This

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the court declined to do, as the first year of administration had not expired, and it could not then be known what debts might be presented for allowance, although the estate was deemed entirely solvent. The executor notwithstanding made other payments to the heirs in advance of any orders of the court, as he was satisfied there would be no debts. From time to time he sought additional orders from the court directing him to distribute the remaining funds in his hands; and was all the time expecting such order. So that it was not deemed best to make loans of the money except on very short call. As the certificates of deposit drew some interest for a short period it was thought best to let the three hundred and forty dollars so remain in bank. The executor repeatedly consulted with the probate judge respecting this money, and the disposition made of it; and his course in the matter was approved by the judge. In November, 1881, the court made an order directing the executor to pay certain heirs a sum sufficient to make them equal with other heirs who owed the estate. This payment was made. The executor kept the certificate of deposit for the three hundred and forty dollars with the papers belonging to the estate; and when he discovered that it ran in his name he concluded not to change it as the money was liable to be called for at any time for the purpose of distribution.

The executor also testified that living so far in the country, and the presence of tramps rendering it unsafe, in his judgment, to keep money at his home, he regarded this bank as the safest place for it. He had no individual money in said bank, as he had no such money. The bank was universally regarded as perfectly solvent, and its officers had the unbounded confidence of the community.

During the fall of 1881 the guardian of one of the heirs had made arrangements with the probate court to purchase for his ward a tract of land, to be paid for out of his distributive share in the hands of the executor. In October the executor came to town with $523.80 for

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the purpose of meeting this arrangement. He was delayed by the railroad train, and did not get into Macon City until after the probate court had adjourned, and the parties concerned had gone home. Learning from the probate judge, and others, that the parties would be in next day to consummate the matter, and his family being sick requiring his presence, he left for home leaving this money with Ben. E. Guthrie, an attorney at law to be paid over the next day, on the completion of the proposed sale. Guthrie not liking to keep the money on his person or at his house over night, stepped into the business-house of the Macon Mercantile Company, and handed this money to one Kem, of this house, marked so as to indicate that it belonged to the Farmer estate, and requested him to place the same in his safe until he called for it the next day. This was done. The next morning Guthrie informed the probate judge that he had the money for the purpose aforesaid. It seems that the arrangement for the purchase of the land fell through. The money not being called for that day, Kem, not desiring to keep the same longer in his safe, deposited the same in said bank, and took a certificate therefor in the name of Guthrie.

The executor having an opportunity to loan two hundred dollars of this money to one Dodson for a short time, gave an order on Guthrie therefor, which Guthrie paid by a check on said bank out of the sum so deposited. McDuffee at the same time directed him to place the balance of the money for him in said bank. This was the twenty-sixth day of October, 1881. Accordingly Guthrie drew his check on the bank in favor of McDuffee for the balance, $323,80, and directed the bank officer to pass the same over accordingly. From some unexplained cause the bank did not enter this credit until the fourth day of February, 1882; near the date of the failure of the bank. McDuffee supposed all the time the money was deposited to his credit as executor.

The bank knew that all this money belonged to the Farmer estate. In January, 1882, McDuffee drew on

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this fund, as he supposed, for two hundred dollars, which he had loaned for a short time to one Brockman. This and the other two hundred dollars loaned to Dodson left $123.80 in bank.

The notes taken by McDuffee for these two loans were to him as executor. When he applied to Melone, the cashier of the bank, for the last-named two hundred dollars, he told him he wanted two hundred dollars of the Farmer money, left by Guthrie, and Melone drew the check, which McDuffee signed. This check was charged against McDuffee individually as an over-drawn check, which fact McDuffee never learned until this trial.

At the date of the failure of the bank the Guthrie check for $323.80 was placed to McDuffee's credit in the bank by Melone, presumably, which paid the so-called draft, leaving the balance of $123.80 in controversy in this litigation. McDuffee had no knowledge of this act of February 4, 1882.

The probate court allowed the credits to the executor, and on appeal to the circuit court the same result was reached; and the heirs prosecute this appeal.

BERRY & THOMPSON, for the appellant.

I. In making a disposition of the surplus money in his hands the executor should have consulted the probate court. He must keep and manage it as a trust, where he can at all times command it, and must not put it in peril. Rev. Stat., sec. 102; *Garesché v. Priest*, 9 Mo. App. 270; s. c., affirmed, 78 Mo. 126.

II. As to defendant's duty and the degree of diligence required of him as trustee, see 2 Pomeroy's Eq. Jur., secs. 1066, 1070; Schouler's Executors and Administrators, secs. 314, 315. He must enter into no relation which would be inconsistent with his trust. 2 Pomeroy's Eq. Jur., sec. 1077. At the time of the bank failure, the bank owed McDuffee, as executor, nothing. It did owe him, individually, the three hundred and forty-dollar note and the balance of his deposit account, to-wit, $123.80, and his relation to the bank was that of

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an individual creditor, and as such these items were allowed to him by the assignee.

III. The taking of the three hundred and forty-dollar note, payable in sixty days to himself individually and not as executor, and allowing the balance of $123.80 to remain on deposit in bank in his name and to his individual credit, was a conversion of the funds of the estate by the executor, and it being lost by the failure of the bank, he must make it good to the estate. By such disposition of the trust fund, he committed a breach of faith in the eyes of the law, and there can be no question of good faith in the case. *Ackerman v. Ermott*, 4 Barb. 626; *Commonwealth v. McAlister*, 28 Pa. St. 480; *Morris v. Wallace*, 3 Pa. St. 319; *Knowlton v. Bradley*, 17 N. H. 458; *Evans v. Halleck*, 83 Mo. 376; *Nattnor v. Dolan*, 8 N. E. Rep. 289, and authorities cited; *Coleman v. Lipscomb*, 18 Mo. App. 443; *Brooks v. Mastin*, 69 Mo. 58; *Garesché v. Priest*, 9 Mo. App. 270; s. c., affirmed, 78 Mo. 126; 2 Pomeroy's Eq. Jur., sec. 1067; Perry on Trusts, secs. 443, 444, 445; Schouler's Executors, sec. 329. Defendant is liable, though he may have told the bank officers the money was a trust fund. *Williams v. Williams*, 55 Wis. 300. The deposit should have been in trust. 53 Ala. 169.

IV. Defendant was bound under the law to so manage the trust fund as not to put it in such a situation that it might in any contingency be subject to the claims or demands of others, or subject the *cestuis que trust* to litigation in respect to it. In case of defendant's death, or of attachment or execution against him while the fund remained in the bank, his administrator or creditors would have taken it. *Harny v. Dutcher*, 15 Mo. 89; *Nicolay v. Fritsche*, 40 Mo. 67; *Cook's Adm'r v. Holmes*, 29 Mo. 61; *Brooks v. Mastin*, 69 Mo. 58; *Block, Adm'r, v. Dorman*, 51 Mo. 31. And knowledge of the bank officers that it was trust money would have cut no figure. *Eyerman v. Bank*, 13 Mo. App. 289, and authorities cited.

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SEARS & GUTHRIE, for the respondent.

I. The finding of the trial court was correct. The whole testimony shows a careful and conscientious discharge of duty by the executor. And unless there is some imperative rule of law making him liable, the courts will relieve him from losses and accidents, where he has used reasonable care and prudence. *Stull v. Meagher*, 44 Mo. 356; *Foster v. Davis*, 46 Mo. 268; *Clyer v. Anderson*, 49 Mo. 37; *Fudge v. Dunn*, 51 Mo. 264; *Gamble v. Gibson*, 59 Mo. 585; *Merritt v. Merritt*, 62 Mo. 150, 157.

II. This executor cannot and should not be held liable for the acts of Melone, whom he had a right to trust and did in good faith trust him, as did every businessman in the community. Melone's failure to keep the books of the bank properly and his positive wrong or mistake in not entering credits where they should be or entering them in the wrong name cannot render McDuffie liable, when McDuffie has, as all the evidence shows, acted honestly and in good faith, believing he was doing for the best, and honestly seeking the security and interest of the estate. And especially when his mistake, if he made a mistake, did not occasion the loss, but the loss would have occurred just the same. Nor is he liable for Guthrie's mistakes, since there was no evidence that he directed, intended it, knew or profited by it. He swears positively that he did not give Guthrie any direction to deposit in his name. *Julian v. Abbott*, 73 Mo. 580.

III. Appellants' contention that the executor is bound by the books of the bank and by the errors, mistakes and positive misfeasances of the bank officers cannot be the law. Because the bank officer entered up the money to the credit of McDuffie instead of to the Farmer's executor, as directed and as they knew they should have done, cannot bind McDuffie, nor make him liable for the loss, and the more so, as it is plain

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from all the evidence that the loss would have occurred any how. Schouler's Executors and Administrators, sec. 315; *Twitty v. Houser*, 7 S. C. 153.

IV. There is no conversion in this case. Because the certificate was kept separate from the personal papers and estate of McDuffie, and kept wholly with the Farmer estate papers in a pocket-book used for that estate alone, and he at no time during the administration had any money of his own in the bank. Therefore, his administrator, in case of his death, could not take the money, nor his creditors. *Utly v. Tolfree*, 77 Mo. 307; *Campbell v. Cox*, 7 Rep. 666; *Richardson v. Bank*, 10 Mo. App. 246; *Parsley's Adm'r v. Martin*, 77 Va. 376; s. c., 46 Am. Rep. 733; Schouler's Executors and Administrators, sec. 205; *Cumberland v. Pennell*, 69 Maine, 357; s. c., 31 Am. Rep. 284; *Morrill v. Raymond*, 28 Kansas, 475; s. c., 42 Am. Rep. 167, and note. In the light of the above authorities, the bank knowing the money to belong to the Farmer estate, could not apply the money to payment of any debt McDuffie might have owed (in fact he did not owe it a cent), and on garnishment would at its peril have been required to answer that the money belonged to the Farmer estate. *Scales v. Hotel Co.*, 37 Mo. 520; *Weil v. Tyler*, 38 Mo. 545; s. c., 43 Mo. 581; *McDermott v. Donegan*, 44 Mo. 84; *Sheedy v. Bank*, 62 Mo. 1, 24. There is an entire lack of evidence to indicate the remotest intention to convert or mingle the trust estate with his own; but, on the contrary, an evident care to avoid the mingling or conversion. We submit the authorities cited by appellants show that there was an intention to convert, and that the general current of the authorities requires an intention to convert. Appellants' cause rests on the fact of an intentional commingling or conversion, which occasioned the loss. But the alleged conversion did not occasion this loss. The loss would be the same if the deposit had been in the name of the estate. 2 Pomeroy's Eq. Jur., secs. 1066, 1076; *Gary v. National Bank*, 2 South Eastern

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Reporter, 568; *National Bank v. Insurance Co.*, 104 U. S. 54.

V. In his settlement the executor is entitled to credit, if equity will allow it, although the law will not. Schouler's Executors, sec. 375; *Fudge v. Dunn*, 57 Mo. 264; *State v. Meagher*, 44 Mo. 356; *Stevens v. Gage*, 55 N. H. 175. Equity looks not to the form, but to the substance of things; and there was neither the intention of conversion nor the fact of conversion in this case; and the executor is not chargeable with the loss. 1 Pomeroy's Equity, secs. 364, 378.

VI. There is no investment of trust money in this case; nor was the trust character of the fund concealed from the bank, but the fact communicated to it; and the entries made by the bank to the individual account of the executor were against his directions and instructions, and without his knowledge at the time.

PHILIPS, P. J.—No question can properly arise on this record as to any misappropriation or application of the money in controversy by the executor. He never used it in his own business, nor mingled it with his individual money or estate. It was his duty to have the money in position to meet any debts, or the order of the probate court for distribution or other purpose. His evidence, and that of the probate judge, shows that he kept himself under the direction and advice of the probate judge. His sole accountability, therefore, turns upon the question of his vigilance and care in the custody of the fund. In other words, the issue is, was the executor guilty of such negligence in the keeping and management of the money as, in the sound discretion of a court of equity, ought to render him liable for its loss? Our own courts have established the rule as to the measure of care to be exercised by such trustees. It is stated thus, in *State ex rel. v. Meagher*, 44 Mo. 356: Executors and administrators stand in the position of trustees; and are liable only for want of due care and skill; and the measure of care and skill required

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of them is the same as that demanded of bailees for hire, viz., that which prudent men exercise in the direction of their affairs. In the course of this opinion the court say: "The care must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility of its being stolen, and the temptations thereto."

So in *Fudge v. Durn*, 51 Mo. 264, the court say the executor is not in any sense an insurer of the property; but a mere trustee acting for the benefit of others, quoting the language of Chancellor Kent in *Thompson v. Brown*, 4 John. Ch. Rep. 619: "This court has always treated trustees acting in good faith with great tenderness." And again from Lord Hardwick in *Knight v. Earl of Plymouth*, 3 Atk. 480: "If there was no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of anxiety and trouble, it is an act of kindness in any one to accept of it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, would be a manifest hardship; and would deter every one from accepting so necessary an office."

It would be unreasonable to say that the executor in respect of the money in question did not exercise the degree of care and prudence which the most cautious of men exercise in the management of their own affairs under like circumstances. He kept this money at the safest place recognized in the community. Had he retained the same at his private house, and the money been stolen, in view of his evidence, he would have been guilty of culpable negligence for not putting it in bank. The only answer made to this is, that by putting the money in bank to his individual credit, he was guilty of an act of conversion; and the money thereafter remained in the bank at his risk. This we might admit would be a correct exposition of the law, did it appear that the

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executor intentionally so placed the money in bank as his, and the bank took and held it in ignorance of its trust character and the intent, one way or the other, of the party so placing it. *Coleman v. Lipscomb*, 18 Mo. App. 444. The evidence shows there was no intention on the part of the executor to have this money placed to his individual credit. He did not so direct it, and did not know at the time it was so done. Nor can it be said he was guilty, under the circumstances, of any culpable negligence in not examining the certificate at the time. He had no individual account at the bank. The cashier knew the money belonged to the Farmer estate, and it was entirely his fault that it was not properly accredited. In such case the bank could not avoid accounting for the money to the estate on demand of the legal representative thereof. *Ihl v. Bank*, 26 Mo. App. 128; *Utler v. Tolfree*, 77 Mo. 307; *Morrill v. Raymond*, 28 Kan. 415.

So it is held that a *bona-fide* deposit by a guardian of his ward's money in his own name, it being clearly shown that it was his ward's money, will protect him against loss, which occurs, not on account of the *form* of the deposit, but by the destruction of the bank. *Parsley, Adm'r, v. Martin*, 77 Va. 376. The loss in question in no wise resulted from the manner of the deposit, but would have occurred had the deposit been made in the name of the executor as such. The equity to the credit in such case must be precisely the same. Had there been any mingling of the trust fund with the individual property of McDuffee, the case would have been different. 2 Pom. Eq., sec. 1076.

As to the $123.80 item the principles of law stated are equally applicable. Guthrie knew the money belonged to the Farmer estate, and so did the bank. The executor never authorized or directed the deposit in Guthrie's name, or his individual name. When Guthrie went to make the deposit, or gave the check for the $323.80 in favor of McDuffee the bank officer stated that McDuffee had no individual account there. And,

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as a matter of fact, he did not enter the credit until near the date of the failure of this bank. He informed Melone when he drew the check for the two hundred dollars that he wanted part of the Farmer money. The bank officer must have, for purposes of his own, been using this check.

We are unable to perceive how it can be held that any culpable negligence is imputable to the executor in this transaction. He had every reason to believe, just as Guthrie did, that the check had been properly passed to his credit. Melone had the confidence of the community; and the depositors had well-founded belief in the safety of their deposits and the perfect integrity of the bank officers. The loss would have occurred in the same way had the check been promptly and properly placed to the credit of McDuffee as executor. In such case there is nothing for a court of equity, or one exercising equity jurisdiction, to hang a decree upon predicated of bad faith, laches, or negligent management.

It follows that the judgment of the circuit court is affirmed. All concur.

WILLIAM JONES, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, July 2, 1888.

1. PRACTICE—APPELLATE COURT—ERROR NOT ASSIGNED IN MOTION FOR NEW TRIAL.—Where error assigned here, was not assigned in the motion for new trial, this court cannot consider it.

2. ——— INSTRUCTIONS—WHEN SUFFICIENT—CASE ADJUDGED.—When there was no evidence in the case, as here, on which to predicate one of the issues (that of contributory negligence), in an instruction, it is not error to ignore such issue in the instruction. Besides another clause of it indirectly submitted the issue, in this case.

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3. —— EXCESSIVE VERDICT—CASE ADJUDGED.—This court cannot say, in view of the evidence here, that the damages were so excessive as to justify its interference with the proper discretion of the jury and the trial court, since the verdict bears no evidence of prejudice or passion to invoke such interference.

APPEAL from Bates Circuit Court, HON. D. A. DEARMOND, Judge.

Affirmed.

The facts are stated in the opinion.

ADAMS & BOWLES, for the appellant.

I. The court erred in giving plaintiff's first instruction. It is too general and indefinite, and ignores the question of contributory negligence pleaded by defendant. The jury should have been instructed that they should take into consideration all the circumstances of the case, the means selected by the respondent for his transportation, the knowledge possessed by him of the dangers and inconvenience of that mode of carriage. *Price v. Railroad,* 72 Mo. 418, 419. And this error was not cured by any instruction asked by appellant. *Man. Co. v. Hudson,* 4 Mo. App. 145; *Bank v. Westlake,* 21 Mo. App. 565; *Brown v. McCormick,* 23 Mo. App. 181.

II. Passengers must take the responsibility of informing themselves of the every-day incidents of railway travelling. *Harris v. Railroad,* 89 Mo. 233; *Mitchell v. Railroad,* 51 Mich. 236; *Railroad v. Hazzard,* 26 Ill. 373; *Railroad v. Randolph,* 53 Ill. 511. The act of the conductor in receiving plaintiff's ticket did not bind him to stop his caboose at the station or at any place or in any manner than the particular exigencies of the service demanded. *Railroad v. Hatton,* 60 Ind. 12; *Railroad v. Randolph,* 53 Ill. 513; *Murch v. Railroad,* 29 N. H. 99 (9 Foster); *Mackey v. Railroad,* 27 Barb. 528; *Harris v. Railroad,* 89 Mo. 233.

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III. Appellant's first instruction in the nature of a demurrer to the evidence should have been given. *Nelson v. Railroad*, 68 Mo. 593; *Kelly v. Railroad*, 70 Mo. 604; *Henry v. Railroad*, 76 Mo. 293; *Lennox v. Railroad*, 76 Mo. 86; *Powell v. Railroad*, 76 Mo. 80; *Murch v. Railroad*, 29 N. H. 99; *Macky v. Railroad*, 27 Barb. 528; *Railroad v. Goddard*, 25 Ind. 185, 189; *Railroad v. Lahey*, 10 Mich. 198; *Railroad v. Stemberg*, 17 Mich. 127; *Railroad v. Miller*, 25 Mich. 279; *Railroad v. Cambian*, 35 Mich. 471; *Snoboda v. Ward*, 40 Mich. 209; *Cockle v. Railroad*, L. R. 5 C. P. and cases cited; *Eckard v. Railroad*, 30 N. W. Rep. 615.

IV. The court erred in compelling the appellant to go to trial, after the amendment of the petition changing the date upon which the injury occurred, and in overruling appellant's motion to make petition definite and certain. *Melvin v. Railroad*, 89 Mo. 106.

V. The damages are exorbitant and grossly excessive. *Railroad v. Hand*, 7 Kan. 380; *Railroad v. Millekin*, 8 Kan. 647; *Railroad v. Young*, 8 Kans. 659; *Railroad v. Peavey*, 29 Kans. 170; *Rose v. Railroad*, 39 Iowa, 256; *Railroad v. McAra*, 52 Ill. 296; *Spicer v. Railroad*, 29 Wis. 580.

WHITSETT & JARROTT and RAILEY & BURNEY, for the respondent.

I. The instructions one and two given for the plaintiff were correct and proper. *Harris v. Railroad*, 89 Mo. 233; *McGee v. Railroad*, 92 Mo. 208; *Leslie v. Railroad*, 88 Mo. 50.

II. The defendant's conductor stopped the train, called out the name of the station, and directed plaintiff and other passengers to get off; and before they had time to reach the door of the caboose, the train was suddenly jerked so as to throw plaintiff with great violence against the stove. This was gross negligence. *Dougherty v. Railroad*, 81 Mo. 325; *Coudy v. Railroad*, 85 Mo. 79; *Harris v. Railroad*, 86 Mo. 233.

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III. It was not negligence for plaintiff to attempt to obey the orders and directions of the conductor under the circumstances of this case. Beach on Con. Neg., p. 173, and sec. 23, p. 71; Shearman and Redfield on Neg., sec. 282; Wharton on Neg., sec. 371; *Allender v. Railroad*, 43 Ia. 281; *Chance v. Railroad*, 10 Mo. App. 352; *Kelley v. Railroad*, 70 Mo. 608; *McGee v. Railroad*, 92 Mo. 218, 219; *Leslie v. Railroad*, 88 Mo. 50.

IV. Errors committed on the trial will not be noticed in this court unless the matter has been specifically called to the attention of the trial court by motion for a new trial. *Chapman v. White*, 52 Mo. 179; *Fickle v. Railroad*, 54 Mo. 219; *Sweet v. Maupin*, 65 Mo. 65; *State v. Burk*, 89 Mo. 635; *State v. Reed*, 89 Mo. 168.

V. Where freight trains are in the habit of carrying passengers, as in this case, a person admitted thereon as such is entitled to all the rights of a passenger; and the company incurs the same liability to him for an injury received by its negligent or wrongful act as if it occurred on a regular passenger train. Rorer on Railroads, 986; *Edgerton v. Railroad*, 39 N. Y. 227; *Railroad v. Lockwood*, 17 Wall. 357; *Dillage v. Railroad*, 56 Barb. 30; *Hartwig v. Railroad*, 49 Wis. 358; *Brassell v. Railroad*, 84 N. Y. 241; *McGee v. Railroad*, 92 Mo. 208.

VI. The damages were not excessive. The court will not interfere with the verdict of the jury on the ground of excessive damages unless they are such as shock the understanding, and induce the conviction that the verdict was the result of passion, prejudice, partiality or corruption. Sedg. on Meas. of Dam. (4 Ed.) 713, and authorities; *Railroad v. State*, 12 Am. and Eng. Ry. Cases, 149; *Railroad v. Pedigo*, 5 W. Rep. 876; *Railroad v. Falvey*, 1 W. Rep. 868; Thompson on Car. of Pas. 576, 585; *Whalen v. Railroad*, 60 Mo. 323; *Porter v. Railroad*, 73 Mo. 124; *Porter v. Railroad*, 71 Mo. 66; *Pritchard v. Hewitt*, 4 S. W. Rep. 437; *Waldhier*

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v. Railroad, 87 Mo. 37; *Railroad v. Roddy*, 5 S. W. Rep. 286; *Sidekum v. Railroad*, 4 S. W. Rep. 701.

VII. An appeal wholly without merit justifies the conclusion that it was taken for delay, and the judgment should be affirmed, with ten per cent. damages. *Schwaner v. Boiler Co.*, 19 Mo. App. 534; *Cordell v. Bank*, 64 Mo. 600; *Utz v. Hoerr*, 20 Mo. App. 36; *Morrison v. Lehew*, 17 Mo. App. 633.

Philips, P. J.—This is an action for personal injuries. The petition alleges, in so far as is here material to be stated, that, on the tenth day of October, 1885, the plaintiff took passage on one of defendant's freight trains to be carried from Pleasant Hill to Harrisonville, a distance of about twelve miles; that he paid the usual fare and that when they had arrived near the depot station at Harrisonville the conductor, or some agent or servant of the defendant, in charge, etc., announced "Harrisonville" station, and said "get off here," the train then having come to a standstill; that plaintiff, in obedience to this direction and information, arose from his seat, with all convenient speed, and started to leave the train; when without any warning the defendant's servants in charge of the train suddenly started the same with a violent jerk, throwing plaintiff down, and greatly injuring him, specifying the nature and character of his injuries; and laying the damages at ten thousand dollars.

The answer tendered the general issue, with a plea of contributory negligence on the part of plaintiff.

The evidence tended to show that defendant was in the habit of carrying passengers on this train between the designated points. The train had a caboose attached to the freight cars in which passengers rode. On this occasion there were several passengers on this train. When the caboose had reached a point about one hundred and fifty yards, or less, from the depot at Harrisonville station, it came to a stop. The plaintiff was then seated near the stove in the caboose. Some one, either the

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conductor, or brakeman, apparently in charge, stepped from the platform into the car, whereupon plaintiff inquired of him, on his announcement of "Harrisonville," if he should get off, and the answer was "yes, get off," or something to that effect. Plaintiff rose from his seat to move to the door to leave the train, when, without any warning, the train gave a sudden jerk, throwing the plaintiff against the stove, and fracturing two of his ribs. This jerking of the car is described by the witness as being forcible and unusually violent. The evidence showed that plaintiff's injuries were painful, and in all probability are of a permanent character, disabling him from his ordinary labor.

The only pertinent evidence offered by defendant tended to show that in the handling of freight trains, or mixed trains, so called, more or less jerking is quite unavoidable; that this is caused by making the slack preparatory to uncoupling and shifting the cars, and starting.

For the plaintiff the court gave the following instruction, which is complained of:

"If the jury shall believe and find from the evidence that the plaintiff, at the time alleged in the petition, was a passenger upon one of defendant's freight trains from Pleasant Hill to Harrisonville, in Cass county, Missouri, and had paid his fare, and was received by defendant as such, without objection upon its part; that while plaintiff was a passenger as aforesaid, defendant's train, in charge of its agent and servants, came to a stop before reaching the depot or platform at its station at Harrisonville, and that one of defendant's agents and servants while said train was standing still, called out the name of said station of Harrisonville, and directed plaintiff and other passengers to get off there; and the plaintiff, believing that said announcement was intended as a direction for him to alight at said place, in obedience to such direction, arose from his seat, and started to alight from said train, and while so attempting to alight, the defendant, without giving plaintiff sufficient

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time to alight, negligently and carelessly ran its engine and car violently against the said caboose, jarring it so that the plaintiff was knocked down and injured without any fault or negligence upon his part, your verdict should be for the plaintiff, in such sum as you may believe from the evidence he has sustained by such injuries."

The court gave every instruction asked for by defendant, presenting every phase of the law to which it was entitled.

The jury returned a verdict for plaintiff, assessing his damages at two thousand dollars. Defendant has appealed.

I. Appellant makes complaint of the action of the trial court in requiring him to go to trial immediately after an amendment of the petition as to the date of the injury. No such error is assigned in the motion for new trial; without which we cannot consider it. This has been so repeatedly held that we need not cite any of the numerous decisions.

II. The instruction given for plaintiff is criticised, because it ignores the contributory negligence set up in the answer. There are two sufficient answers to this: first, there was no evidence in the case on which to predicate such issue in an instruction, and, second, the matter is sufficiently submitted, because the instruction expressly directed the jury to find that plaintiff was "injured without any fault or negligence upon his part." This instruction was sufficiently full, as applied to the facts in this case. *McGee v. Railroad*, 92 Mo. 208, 219.

III. The only other contention made is, that plaintiff, in taking passage on a freight train, took upon himself all the hazard, inconveniences, and rules of the company incident to the running, management, and jerking of such trains. Concede it; the defendant had every advantage of such propositions of law in the instructions asked by it and given by the court. It is, however, a sufficient and complete answer to the whole argument of counsel, that the facts of this case do not

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justify the application of the rules invoked by defendant. His injury was not the result of the ordinary method of running such trains; the jerking which occasioned his injuries was not such as occurs in the running of the trains, and the necessary switching at stations, which a passenger must ordinarily expect and guard against. But the *gravamen* of this action is, that after defendant had brought its cars to a standstill, and advised its passengers to alight, and while they were obeying its invitation, it carelessly and negligently put its train in motion, whereby the injury came. Knowing, as its evidence shows it did, the liability of such a train to violently jerk, it was guilty of inexcusable negligence in telling its passengers to depart, and permitting the train to move and jerk while they were on their feet attempting to obey its directions. The passengers had a right to act upon the presumption that defendant would not move its cars under such circumstances until its passengers were clear of the caboose; or, if the slack was then liable to occur in the process of stopping the car, it should have warned its passengers to look out for it, especially when this servant observed that the passenger was obeying his invitation to leave the car.

IV. Respecting the amount of damages allowed by the jury, we cannot say, in view of the evidence, that they were so excessive as to justify our interference with the proper discretion of the jury, and the trial court. Greater damages for much less serious injuries than the plaintiff's have been upheld by the Supreme Court. This verdict bears no evidence of prejudice or passion, to invoke our interference.

The judgment is affirmed. All concur.

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WILLIAM R. TAYLOR *et al.*, Plaintiffs in Error, v. VINCENT K. HINES, Defendant in Error.

Kansas City Court of Appeals, July 2, 1888.

1. ACTION—RIGHTS OF MORTGAGEE AGAINST PERSON SUING OUT WRONGFUL ATTACHMENT—CASE ADJUDGED.—Persons holding a second mortgage on personal property wrongfully attached (so determined by a legal controversy between the holders of the first mortgage and attaching creditor) may recover from the attaching creditor damages, caused by the diminished value of the property wrongfully attached. They are entitled, as second mortgagees, to the property remaining after satisfaction of the first mortgage, and the person wrongfully attaching, and interfering with their security, rendered himself liable to such mortgagees at least to the extent of their loss thus wrongfully brought about by him.

2. ——— ——— PROPERTY REDUCED TO SALE—The subjecting of the property by the first mortgagees to their debt did not affect the right of the second mortgagees to this action. The action is not for an injury to the possession, but to the substance of plaintiffs' security. The recovery is for the proceeds of the property, to the extent of plaintiffs' interest in it.

ERROR to Henry Circuit Court, HON. J. B. GANTT, Judge.

Reversed and remanded.

Statement of case by the court.

The following is believed to be a sufficient statement of the case.

This was an action by the plaintiffs, as second mortgagees, to recover from defendant a balance of the value of the mortgaged property, which the defendant had improvidently levied upon under an attachment which he had sued out against the mortgageor, and which balance he had consumed in the costs and expenses attending the attachment, and had failed to restore to the mortgagees, after they had prevailed in an interplea, which they had filed in the attachment suit.

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The facts of the controversy, as disclosed by the pleadings and the evidence adduced upon the trial, are asfollows:

In August, 1881, one Jacob Leon executed a mortgage to these plaintiffs to secure to them certain indebtedness due to them, which mortgage was subject to a prior one executed a few days previous to other creditors of Leon. After default upon the mortgages the first mortgagees took possession of the mortgaged property, and, under the terms of their mortgage, and while so in possession, this defendant sued out his attachment suit against Leon and caused all of the mortgaged property to be levied upon and taken from the mortgagees.

About the same time another attachment was levied upon the same property, and still later three other attachments were so levied. The five attaching creditors then procured from the judge of the Henry circuit court, where the attachment suits were pending, the appointment of a receiver and an order directing him to sell the attached property. At the first term of the court thereafter interpleas were filed by the first and second mortgagees respectively, claiming the attached property. Before the interpleas were determined the receiver had sold a portion of the attached property, realizing the sum of $5,167.45, of which sum there was used for the expenses of the attachment the sum of $1,014.92. The attachment creditors then applied for an order directing the receiver to restore to the mortgagees the balance of the property remaining unsold, and notified the mortgagees of such application. All parties agreed that said property might be restored without prejudice to the rights of any, and the balance was thereupon, under the order of the court, turned back to the first mortgagees, who realized from the same a net sum of $2,664. Afterwards the interpleas came on for trial, and the court found that the interpleaders were entitled to the possession of the attached property, to be applied in payment of their respective debts; and

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it appearing to the court that part of the attached property had been sold by the receiver as aforesaid for the sum of $5,167.45, and that the receiver only had in his hands after deducting the amount consumed in the expenses of the attachment a balance of $4,152.53, and it further appearing that the first mortgagees had realized the sum of $2,664 from the sale of goods restored to them, the balance due said first mortgagees was found to be $3,500.12; the court in the interplea of the first mortgagees, all parties consenting that judgment be rendered for the proceeds of the attached property instead of the property itself, adjudged that the first mortgagees as interpleaders recover out of the $4,152.53 the balance of $3,500.12, due them.

In the interplea of the second mortgagees, after finding that said interpleaders were entitled to the possession of said property, subject to the rights of the first mortgagees, and also finding as in the judgment upon the first interplea concerning the disposition of the property and the amount realized therefrom, and further finding that, after allowing the credit upon the first mortgage debts for the amount realized from the sales of property restored to the first mortgagees, the sum of $3,500.12 was required from the proceeds of the sales of attached property by the receiver to satisfy said first mortgage debts, and that over and above the amount consumed in the attachment the balance still remaining in the hands of the receiver was $652.41, and that the amount due on the debts of the second mortgagees was in the excess of said balance in the hands of the receiver, with the consent of the attaching creditors, adjudged that said second interpleaders recover said balance of $652.41, to be applied *pro rata* on their several claims; and the receiver was ordered to pay the same to these plaintiffs as said second interpleaders.

The present action was brought by these plaintiffs to recover the balance of the proceeds of said sales of the attached property which had been consumed in the

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expenses of the attachment. Upon the trial the plaintiffs introduced the two chattel mortgages and the records of the several interpleas and the judgments thereon, showing the facts as above set forth, and also the record of the attachment suit of this defendant against Leon, showing that the plea in abatement filed by Leon had been sustained. The defendant offered evidence for the purpose of showing that the first mortgagees had sold that portion of the property which had been returned to them, at a sacrifice. The plaintiffs objected to evidence of that character, for the reason that it was immaterial and incompetent, because the plaintiffs were not responsible for the acts of the first mortgagees, and because the question as to the value and the amount realized from the property restored to the first mortgagees had been adjudicated by the judgment in favor of the plaintiffs on their interplea. These objections were overruled by the court and the defendants allowed to introduce the evidence. The plaintiffs afterward, to rebut said evidence, introduced evidence on their part showing that said mortgagees had realized for said portion of the property turned back to them all that could have been realized therefrom and all that the same was reasonably worth. The case having been tried before the court without a jury, the plaintiffs asked no instructions. The defendant asked several instructions, two of which were given by the court. Instruction number two, which was given, declared that the plaintiffs could not recover in this action unless they had shown by the evidence that they would have realized their debts out of the mortgaged property if the same had not been attached. The second instruction given them, called number three, declared in effect that the plaintiffs were only entitled to recover that portion of their indebtedness which they had lost by reason of the attachment. The plaintiffs excepted to the giving of these instructions because they were inconsistent, and because instruction number two was

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improper. The court then made a finding in favor of the defendant, based upon a reason which does not appear from the record, being, as stated by the parties, that the present action of the plaintiffs was *res adjudicata* by the judgment upon the interplea in favor of the plaintiffs.

GEO. P. B. JACKSON, for the plaintiffs in error.

I. The court erred in admitting evidence concerning the manner and amount of the sale of the portion of the goods released from the attachment to the first mortgagees. (*a*) The second mortgagees, these plaintiffs, were not responsible for the acts of the first mortgagees. (*b*) The plea in abatement to defendant's attachment having been sustained, the defendant had no interest in the goods restored to the first mortgagees. If there had been any sacrifice of these goods, it was a question between the first mortgagees and their debtor, Leon. (*c*) After his attachment was defeated, this defendant, as attaching creditor, had no right to retain or use any portion of the proceeds of the property he had caused to be sold, regardless of what was done with the portion not sold. (*d*) In determining the interpleas, it was necessary to ascertain the interests of the interpleaders. *Tippack v. Briant*, 63 Mo. 584. Therefore, when, in the judgments on the interpleas, it was determined that the claims of the interpleaders should be credited with a certain sum, as the proceeds of the sale of the portion of the property restored by the attaching creditors, all matters pertaining to that sale became *res adjudicata*, and could not be retried in this case.

II. The second and third instructions given at the instance of defendant were inconsistent. One declared that the plaintiffs could not recover unless they had shown by the evidence that, but for the attachment, they would have made their whole debt out of the attached property; while the other decared lthat they

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could only recover for the portion of their debts which they had lost by reason of the attachment.

III. The court erred in giving the second instruction for defendant, because it declared that, unless plaintiffs had shown that they could have made their whole debt out of the attached property, they could not recover for the portion which they could have made, and which had been lost to them.

IV. The finding and judgment of the court was against the third instruction, and against the evidence in the case. The pleadings and the evidence show that the attached property was sold for $5,167.45; that $1,014.92 of that was used for expenses of the attachment, and the balance only turned over to the mortgagees. The amount thus misapplied on the attachment would otherwise have been available to the mortgage debts, and was, therefore, lost to them by reason of the illegal attachment.

V. The court below held, and it will probably be insisted here, that the present action was adjudicated by the judgment on the interplea in favor of these plaintiffs. This is erroneous. The issues in this case were not involved in the interplea. The interplea was in the nature of replevin. *Burgert v. Borchert*, 59 Mo. 85; *Manufacturing Co. v. Bean*, 20 Mo. App. 119. Upon the interplea, the issue was whether or not the interpleaders were entitled to the property; and the finding must respond to that issue. *Hewson v. Tootle*, 72 Mo. 632; *Nolan v. Deutsch*, 23 Mo. App. 1. The judgment must conform to the verdict, unless the parties consent to something else. *Tippack v. Briant*, 63 Mo. 580; *White v. Graves*, 68 Mo. 218; *Wooldridge v. Quinn*, 70 Mo. 370; *Hewson v. Tootle*, 72 Mo. 636. The consent was that the balance of money on hand should be turned over to the interpleaders, but not that it should be in lieu of all the attached property. The judgment on the interplea does not purport to determine any issue involved in this case. *Armstrong v. St. Louis*, 69 Mo. 309. While a judgment is *res judicata*

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of everything that is necessary to its rendition, it is not such as to every question that might collaterally arise on the trial, nor as to matters which might be comprehended unless they are shown to have been in fact litigated. *Railroad v. Traube*, 59 Mo. 362; *Spradling v. Conway*, 51 Mo. 51; *Spurlock v. Railroad*, 76 Mo. 67; Freeman on Judgments, secs. 256, 260; Wells' Res Judicata, 200, 215, 290; Herman on Estoppel, secs. 210, 211, 212, 228.

FYKE & CALVIRD, for the defendant in error.

I. The court did not err in admitting evidence that the goods, which had been turned over by consent to first mortgagees, were sold at a sacrifice, with the knowledge and consent of plaintiffs. Plaintiffs, if entitled to recover at all, could only recover the surplus after satisfying the first mortgage. *White v. Quinlan*, 30 Mo. App. 54. It was, therefore, material to show that the surplus was reduced by the action of the first mortgagees, to whom the goods were delivered by consent of plaintiffs.

II. The instructions are not before the court, and the action of the court in giving instructions cannot be reviewed, because plaintiffs, in their bill of exceptions, do not show what instructions were given or refused. Something more than "given" or "refused" on the margin must appear to indicate whether instructions were given or refused. *State v. Johnson*, 81 Mo. 60; *Barber v. Hereford*, 48 Mo. 323. In any event the instructions so qualified each other, that no harm could possibly have been done plaintiffs.

III. Although the court may have rendered an erroneous judgment on the interplea, since no appeal was taken, and plaintiffs having acquiesced in said judgment, are estopped. The court properly held that plaintiffs' rights were adjudicated by the judgment on the interplea in favor of plaintiffs. In that proceeding judgment by consent was rendered for so much money instead of for the property. This was proper. The

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court found that plaintiffs were entitled to the property, and as it had been sold under order of the court, judgment was rendered for the proceeds. *Nolan v. Deutsch*, 23 Mo. App. 1. Not only was the issue as to ownership involved in the interplea, but the question of value of the goods or the amount of their proceeds was involved. The court having found that plaintiffs were entitled to the proceeds left after satisfying the first mortgage ($652.41), and plaintiffs having received and accepted that sum, are barred and estopped by that proceeding. *Carroll v. Woodlock*, 13 Mo. App. 574; *Trans. Co. v. Traber*, 59 Mo. 355; *Richardson v. Jones*, 16 Mo. 177. When a claimant interpleads, an issue is made up and must be tried without unnecessary delay, as an original cause between plaintiff and defendant. The law contemplates in every such case a final judgment. *Ladd v. Couzins*, 35 Mo. 513. A final judgment was rendered on the interplea filed by plaintiffs. The court found that plaintiffs were entitled to the balance of the proceeds of the goods in the hands of the receiver, after satisfying the first mortgage and also found what that amount was. The court could not have found otherwise, for, under the decision of this court in *White v. Quinlan*, 30 Mo. App. 54, the second mortgagees were not entitled to the specific goods, but to the surplus only, after the first mortgage was satisfied.

IV. It is well settled that the same point or question, when once litigated or settled by verdict and judgment thereon, shall not be again contested in any subsequent controversy between the same parties, depending on that point or question. *Armstrong v. St. Louis*, 3 Mo. App. 100; *White v. Van Houten*, 51 Mo. 577.

V. Plaintiffs, under the circumstances of this case, cannot recover in this action, even if the judgment on the interplea is no bar, because at the time of the levy the first mortgagees were in possession of the goods after condition broken; therefore, the only interest plaintiffs had in the property was the right to redeem

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Until they exercised that right they had no such interest as to authorize them to sue in trespass or for conversion of the goods. *White v. Quinlan*, 30 Mo. App. 54. None of the proceeds of the goods was ever received by this defendant, hence plaintiffs could not maintain *assumpsit* against him.

ELLISON, J.—A reference to the statement in this case will discover that the plaintiffs were second mortgagees of a lot of personal property which defendant wrongfully attached; and that such attachment was determined to be wrongful on the separate interpleas of plaintiffs and the first mortgagees. That the proceeds of the property while under the attachment, and by reason of the attachment, was diminished to such an extent that plaintiffs are not able to make their debts. Under such state of case, I have no doubt of plaintiffs' right to recover.

Plaintiffs, as second mortgagees, were entitled to the property remaining after satisfaction of the first mortgage and when defendant wrongfully attached all the property, destroying such portion thereof as to interfere with plaintiffs' security, it is quite apparent that he rendered himself liable to plaintiffs at least to the extent of their loss he thus wrongfully brought about. By some courts it is held, the liability extends to the full value of the property though sufficient remain out of which to make the mortgage debt. Of this we need not express an opinion.

That the property had been reduced to the possession of the first mortgagees under the terms of their mortgage, did not destroy or affect the right of the second mortgagees to this action. The action is not for an injury to the possession, but to the substance of plaintiffs' security. The petition states the actual facts showing an injury to plaintiffs' security. It states a cause of action. *Gooding v. Shea*, 103 Mass. 360; *Searle v. Sawyer*, 127 Mass. 491, 493, and cases cited; *Worthington v. Hanna*, 23 Mich. 530.

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It is contended that the judgment on the interplea is a bar to this action. I think not. It was ruled in *Clark v. Brott*, 71 Mo. 473, that a successful interpleader could, notwithstanding his interplea, sue the officer levying the attachment, for the trespass. And in *Perrin v. Clafflin*, 11 Mo. 13, the plaintiff, after a successful interplea, sued Clafflin who was plaintiff in the attachment writ which had been levied upon his goods, the court holding Clafflin liable to such action. So, if in this interplea plaintiffs had recovered the goods themselves the cases just cited would be direct authority for this action. The fact that the recovery is for the proceeds of the property cannot alter the case. The judgment itself shows a large portion of the mortgaged property was used in expenses attending the wrongful attachment and that plaintiffs' claims were not satisfied.

If it be conceded that the first mortgagee sold the portion of the mortgaged property turned back to him, at a sacrifice, and that plaintiffs knew of such sale, I am not able to see how it can relieve the wrongful act of defendant in destroying the mortgaged property so as to diminish plaintiffs' security.

The judgment will be reversed and the cause remanded. HALL, J., concurs; PHILIPS, P. J.. having been of counsel, not sitting

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J. M. POWELL *et al.*, Respondents, v. P. Y. HURT *et al.*, Appellants.

Kansas City Court of Appeals, July 2, 1888.

1. ADMINISTRATION—DUTIES OF EXECUTOR AS TO COLLECTION OF DEBTS.—It is the duty of the executor or administrator of an estate to diligently and speedily collect the debts due the estate, especially such as are out on personal security only, pay the debts of the deceased and distribute the residue to the heirs or legatees; and the executor or trustee will become personally liable, if he does not get in the money within a reasonable time.

2. —— DIRECTIONS IN A WILL—DUTY OF EXECUTOR CONCERNING. When there is direction in the will as to what shall be done with the testator's effects, all question or debate is closed. The will of the testator is the law for the executor. It is a fundamental principle that a trustee accepting the trust, must comply with its provisions and an executor is a trustee in such sense.

3. —— —— EXTENT OF LIABILITY OF EXECUTORS, ETC., FOR DEFAULT OF DUTY.—Although the rule of law is established in this state that executors and administrators are only responsible for want of due care and skill, and that the measure of care is that which prudent men exercise in the management of their own affairs; yet this rule only applies to matters left to the discretion of the executor. If the testator has asserted his own discretion the executor must obey it.

4. —— —— STATUTE PROVISIONS AS TO INSOLVENT DEBTORS. Under section 240, Revised Statutes, providing that an executor shall receive credit for all debts charged in the inventory where "the debtor was insolvent, or that from any other cause, it was impossible for the executor or administrator to have collected such claim by the exercise of due diligence," the word "insolvent" is used as meaning impossibility to collect. (*Julian v. Abbott*, 73 Mo. 583).

5. —— —— DUTY OF DEMANDING PAYMENT—RULE CONCERNING. The general rule is that all debts in the inventory, not designated desperate, shall be accounted assets in the hands of the executors or administrators, and in order to escape such accountability, he must show that they are desperate, or at least show a demand and refusal. He should take legal steps to recover unless from the notorious insolvency of the debtor a suit would be unavailing. (PHILIPS, P. J., dissents in a separate opinion).

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APPEAL from Macon Circuit Court, HON. ANDREW ELLISON, Judge.

Affirmed.

Certified to Supreme Court.

The case is stated in the opinion.

PEAK, YEAGER & BALL and B. R. DYSART, for the appellants.

I. The prevailing rule in the state is that executors and administrators stand in the position of trustees to those interested in the estate upon which they administer, and are liable only for want of due care and skill, and that the measure of care and skill required of them is that which prudent men exercise in the direction of their own affairs. And when the executor acts prudently in good faith for what he deems for the best interest of the estate he is not liable, though it may turn out afterwards he was mistaken in judgment. *Merritt v. Merritt*, 62 Mo. 150, 157, and authorities cited; *Mosman v. Bender*, 80 Mo. 585; *Van Bikken v. Julian*, 81 Mo. 626; *Neff's appeal*, 57 Pa. St. 91; *Kellen's appeal*, 8 Pa. St. 288; *Watkins v. Stewart*, 78 Va. 111.

II. Applying this rule, we contend that under the undisputed facts in this case the court erred in refusing to allow the executors credit for said note of Benedict and Melones.

III. The policy of the law is to deal leniently with executors when they act in good faith, and with sound discretion, as in administering upon estates cases must arise when they are absolutely required to use their discretion. *Gamble v. Gibson*, 59 Mo. 596; *Julian v. Abbott*, 73 Mo. 580.

IV. An executor is not an insurer in any sense of the word. *Fudge v. Dunn*, 51 Mo. 264; *State ex rel.*

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v. Meagher, 44 Mo. 356; *Foster v. Davis*, 46 Mo. 268.

V. The provisions of the will with reference to the manner and time of collecting the assets and distributing the same are merely directory, and do not and cannot change the right, duties or liabilities of the executors. See authorities cited, *supra.*

JOHN T. JONES, for the respondents.

I. Hurt and Powell by agreement divided the notes of deceased between them for collection, but this relieves neither and each is chargeable with the negligent acts of the other as well as himself. Williams on Executors, 1548, and cases cited; 8 Cent. Law Jour. 63; 11 Cent. Law Jour. 216; 13 N. J. Eq. 308.

II. An executor qualifying must follow the direction of the will implicitly or make himself liable. *Weigan's Appeal*, 28 Pa. St. 471; *Brenneman v. Frank*, 58 Pa. St. 475; Williams on Executors [Ed. of 1855] 1530, and cases cited; *Booth v. Booth*, 1 Beav. 125.

III. These executors, to relieve themselves, must show that this note could not have been collected while in their hands. 62 Mo. 460; *State ex rel. v. Taylor*, 72 Mo. 656; Williams on Executors, 1530; *Stiles v. Guy*, 4 Y. & Coll. 571, 575; *Williams v. Nixon*, 4 Beav. 472; *Tebbs v. Carpenter*, 1 Madd. 298; *Julian, Adm'r, v. Abbott*, 73 Mo. 580; *Powlson v. Johnson*, 29 N. J. Eq. 529; *Fisher v. Kilnous*, 18 N. J. Eq. 229; 16 N. J. Eq. 514; *Holcomb v. Holcomb*, 11 N. J. Eq. 477, 495.

IV. An executor or administrator is held to a much stricter account than a trustee or guardian. 10 Casey, 474; 4 Johns. Ch. 619; Williams on Executors, 1530, 1537, and cases cited.

JOHN F. WILLIAMS, also for the respondents, on motion for a rehearing.

I. The law is, that in all matters of controversy between trustee, and *cestui que trust*, we must be controlled by the terms of the instrument creating the

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trust. In this case, the testator directed his personal estate to be converted into money as soon as the same could be done, and distributed amongst his children, while he left it discretionary with his executors as to the time, terms, and manner of the sale of his realty. In the matter of his personal estate, deceased's directions are plain and pointed: collect as soon as you can. Did they do it? Did they attempt to follow the directions of the testator? They don't claim that they did. They rather seem to stand upon the doctrine, that they exercised a wise discretion, in a matter in which they had no discretion. The proof shows conclusively that they made no sort of effort to collect this debt, due March 12, 1881, until February 16, 1882. That they absolutely ignored the directions of the testator and assumed the responsibility of letting the note run, and thus fixing the liability upon themselves without the shadow of an excuse for so doing. Because it is the settled doctrine of the law that if a trustee or executor departs from the directions of the instrument that creates him, he does it at his peril, and if loss accrues he is personally liable. When executors proceed without directions of the will, or an order of court, they assume the risk, and the law holds them to a strict accountability. Tiffany and Bullard on Laws of Trusts and Trustees, 629, 630; *Howe v. Earl of Dartsmouth*, 7 Ves. 137; 62 Mo. 150; Williams on Trustees, 1530.

II. If these executors had been clothed by the will, with discretionary power, in the matter of the collection of this note, then the court might say, in view of the surrounding circumstances, that they had not abused their discretion. In such case it might so find, but if it did, even in that case, it would run counter to the law as written. It cannot be said even in the absence of directions in a will, that it is prudent for executors to let an unsecured note run for eleven months after it is due, and make no effort to collect it or secure it. The law of trusts does not favor mere personal

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security, but requires such outstanding debts to be collected at once, even though the testator himself created the debt by a loan (as in this case) on what he considered an eligible investment. *Powell v. Evans*, 5 Ves. 339; *Bullock v. Wheatly*, 1 Coll. 130; *Styles v. Guy*, 1 Mac. & Jer. 422; Tiffany and Bullard on Trusts and Trustees, 581. But that is not this case. Here, the testator gives them no discretion in the collection of his notes and accounts, but ordered them to collect at once; and yet they delay for eleven months. During all these months they made no effort to collect the note. They say the note is good, and let it run, that it is drawing interest. But the making of interest is not the primary object of executors in settling up estates—it is only a secondary matter. Their primary duty under the law, even in the absence of specific directions, is to collect the debts and convert them into cash. Here again these executors stray from the beaten path, and under the settled rule of law, incur a personal liability, even in the absence of instructions to collect as soon as may be. The law compels speedy collections. It directs the executor to take prudent measures for bringing all personal property of the deceased into his actual control and possession. And there is no function of his office which calls for such energy, promptness, and discretion in its discharge as this. Schouler's Executors and Administrators, 269.

III. Collection precedes, in natural order, the settlement of all debts, charges and legacies, and is the primary essential of prudent administration. And in the absence of all direction in the will, the executor must proceed at once to collect every personal debt of the testator. If parties fail or refuse to pay, the court is open, and he must see or show the insolvency of the debtor and that suit would have been unavailing, or he would be held liable. But when the will gives directions, the law tolerates no negligent performance of the duties assumed. Williams on Executors, 1806; *Bacon v. Clare* 3 N. Y. 294. And if the executor fail to follow

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the directions of the will, and loss occurs, he is liable to make it good. *Clough v. Bond*, 3 M. & C. 496; Schouler's Executors, 336; *Williams v. Pettigrew*, 62 Mo. 460; *State ex rel. v. Taylor*, 72 Mo. 656.

IV. That a demand at any time from the twelfth of March, 1881, to the middle of February, 1882, would have brought the money—all agree in this. Was it impossible for the executors to have collected this note by the exercise of due care and diligence? Rev. Stat., sec. 240. If this is true, then under the statute law of the state, leaving out of view the directions in the will, these executors are liable. They have not acted the part of prudent and careful executors, even if left to their own discretion. But these executors were not allowed any discretionary power in the matter of collecting this note. They were ordered by the testator to collect it at once, as soon as they could—no delay was allowed—no time was given them—collect as soon as may be. The will determines the duties and liabilities of the executors in this case. An order of the probate court to delay the collection of this note eleven months would not protect them. They could have collected the note by demanding the money, and it was their plain official duty to do it. They cannot now be heard to say, after their imprudent neglect of duty, that the failure of the Macon Savings Bank and the assignment of Benedict, Melone & Company, in February, 1882, prevented them from collecting this money. They were in default, long before their failures occurred, and being out of line and already liable, these failures cannot save them. The makers of this note were doing a large wholesale grocery business in Kansas City, carrying a stock of ninety-eight thousand dollars at the time they assigned, February 16, 1882. They could have paid, and would have paid this note of only one thousand dollars at any time, had payment been demanded, and yet it was not such a note as the law allows the common administrator to leave outstanding. Common prudence in the management of trust funds forbids it; and yet these executors, in total disregard of

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the law and in disobedience of the directions of the testator, take no step, make no effort, for eleven months to collect this money.

V. With proper effort, would the money have been collected? If yes, then the executors are liable. It was the duty of the executors to follow the directions of the will. Then, if loss ensued, it would not fall upon them; but otherwise if they failed to follow its directions and by so doing, sustained loss. In order to determine the liability and duties of executors, the intention of the testator, as expressed in the will, always prevails. "There is but one safe course," the law says, "for executors to pursue, and that is, to implicitly follow the directions contained in the will under which they are appointed." *Weigan's appeal*, 28 Pa. St. 471; *Branerman v. Frank*, 28 Pa. St. 475; Williams on Executors [Ed. 1855], 1530, and cases cited.

ELLISON, J.—The defendants are the executors of the will of Henry A. Powell. The plaintiffs are a majority of his heirs. The executors on final settlement before the probate court asked credit for a note of one thousand dollars, given by C. H. Benedict, J. B. Malone, and R. A. Malone, on the ground that it could not be collected. The probate court allowed the credit and plaintiffs appealed to the circuit court where the credit was disallowed, and the executors appealed to this court.

The facts of the case are, that deceased died in September, 1880, leaving as a part of his property, the note in question. This note is dated March 12, 1880, due one year after date, with ten per cent. interest. The executors qualified September 24, 1880. Among other provisions of the will was the following: "4. I direct my executors to collect all my notes and accounts due me as soon as the same can be done, and also convert all other personal property to cash within the first year of the administration, or as soon thereafter as may be."

It appears that the makers of this note were the

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proprietors of a wholesale grocery-house in Kansas City, and that Benedict and R. A. Malone attended to the affairs of that establishment in said city; that J. B. Malone was president and manager of the Macon Savings Bank, in Macon City, where he resided. In the month of February, 1882, both the house in Kansas City and the bank in Macon City made an assignment and became notoriously insolvent. But, up to the time of the assignment, J. B. Malone was universally considered as abundantly solvent. His financial standing and ability was above reproach, and his commercial credit beyond all question. The wholesale house in Kansas City was run on his commercial standing. The bank was considered safe, and yet he was considered even safer than the bank. The evidence, however, shows that, in point of fact, he was insolvent at the time of the testator's death, and on up to the assignment. That is to say, his debts largely exceeded his assets. About four months after the note was due, one of the executors presented it to J. B. Malone, who requested him to wait awhile; the executor, thinking he could get the money as well one time as another, waited, and never demanded the payment of the same, or took any steps for its collection, until after the assignment.

The question presented under these facts is, are the defendants entitled to a credit for this note on the ground that it was impossible to collect it by the exercise of due diligence? Rev. Stat., sec. 240. It is perhaps well in this case to consider the duty of an executor when acting in relation to matters about which he has been specifically directed by the testator, as well as when acting without such direction. In my opinion, it is the duty of the executor, without being directed by will, to diligently and speedily collect in the debts due the estate, especially such as are out on personal security only. The duty of an executor is to pay the debts of the deceased and distribute the residue to the heirs or legatees. To do this, he must collect in the debts due the estate. It is, therefore, said that the collection

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of debts due the estate, "is the primary essential of prudent administration." Schouler Exr's & Admr's, secs. 269, 308, 309. "Personal securities change from day to day; and as the death of the testator puts an end to his discretion in regard to them, unless he has exercised it in his will, the executor or trustee will become personally liable, if he does not get in the money within a reasonable time." Perry on Trusts, sec. 440. The same principle is announced in *Clough v. Bond*, 3 M. & Cr. 496; *Styles v. Gay*, 1 Mac. & G. 422; *Bullock v. Wheatley*, 1 Collyer's Ch. 130; *Tebbs v. Carpenter*, 1 Madd. 298; *Powell v. Evans*, 5 Vesey, 843; *Paddon v. Richardson*, 7 DeG., M. & G. 582; *Shultz v. Pulver*, 3 Paige Ch.; affirmed in 11 Wendell, 361; *Oglebay v. Howard*, 43 Ala. 144; *Johnson's Estate*, 9 Watts & Serg. 107. An executor, unless charged in the will, is not like a guardian, and his trust is not for the investment like that of a guardian, but he should collect in the debts. "His duty, therefore, is unlike that of a guardian. The latter is not bound to sue at once, but may leave a debt where he finds it, unless there is reason to apprehend danger; but an executor or administrator is under obligation to diligence in preparing for distribution." *Charlton's appeal*, 34 Pa. St. 473.

The foregoing authorities are only a few among many others, in both England and the United States, which hold that debts without something more than personal security must be diligently collected as soon as may be; and this without reference to a direction in the will. But when there is direction in the will as to what shall be done with the testator's effects, all question or debate is closed. The will of the testator is law for the executor. It is a fundamental principle that a trustee accepting the trust, must comply with its provisions. "When the will contains express directions what the executors are to do, an executor, who proves the will, must do all which he is directed to do as executor, and he cannot say, that though an executor he is not clothed with any of these trusts." Williams Ex'rs, bottom page 1796; Schouler Ex'rs & Admr's, sec. 382.

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In *Weigland's appeal*, 28 Pa. St. 471, the court said: "We regret the loss that falls upon the surviving executor, as we are satisfied that there was no intentional neglect of duty upon his part. There is but one safe course for executors to pursue, and that is to implicitly follow the directions contained in the will under which they are appointed." In *Mucklow v. Fuller*, Jacob's Ch. 198, John Mucklow was indebted to the testatrix in the sum of five thousand dollars, and in her will she "directed her executors and trustees to get in and place the said five thousand dollars on government stock or security at interest in their joint names within three years next after her decease." It was not so collected. The Lord Chancellor said: "The will contains express directions what the executor is to do, and if he makes himself an executor, he must do all which he is directed to do as executor."

In *Booth v. Booth*, 1 Beav. 125, the Master of the Rolls said: "This is a very unfortunate case. It is to be lamented that Batekin, by inadvertence and over good-nature, should have placed himself in such a situation of responsibility as he has done. Here is a will the terms of which are perfectly distinct; on the twenty-sixth of October, 1830, the two executors proved the will; they took on themselves the trust and the duty of performing it. From that moment it was their duty to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied." In *Prior v. Talbott*, 10 Cush., it was said of the executor that it was "his duty to administer the estate according to the will, and such is the condition of his bond." These authorities are by no means all that may be found. From my examination of the subject I feel safe in saying that all, both text-books and reports, bear the imprint of the rule that an executor must strictly obey the direction of the testator.

I am not unmindful of the rule of law established in this state and elsewhere, that executors and administrators are only responsible for want of due care and

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skill and that the measure of care and skill required of them is that which prudent men exercise in the direction and management of their own affairs. *Merritt v. Merritt*, 62 Mo. 157. But this rule, of course, only applies to matters left to the discretion of the executor. In order for such rule to have any application, the testator must have left room for the exercise of the executor's prudence and skill. If the testator has asserted his own discretion and will, the executor must obey it, otherwise the executor would be administering his own will, instead of the testator's.

Suppose a testator should direct that upon his death one thousand dollars should be paid to his nephew and two thousand dollars to his niece, and yet it could be shown that prudence would suggest that the larger sum should have been given to the nephew and the lesser to the niece, would that excuse him for such application of the money? Suppose the testator should direct the executor to loan certain of his moneys on real estate security or to invest in government bonds, will he be excused for loss consequent on loaning to individuals without security, although they appeared to be on solid financial basis and prudent businessmen were making loans to them? These questions answer themselves, and they serve as an apt illustration that the rule of prudence and skill only applies where there is room for prudence and skill under the will.

If the executors had demanded the note and been refused, and if in the *bona-fide* exercise of their judgment they had concluded the note could not be collected, and such conclusion was such as a prudent man would have arrived at in managing his own affairs, then, even though it turned out they were mistaken, they would not be liable. If the testator had directed that the executors collect all his questionable debts but not his good ones, in such event, under the evidence in this case, the executors would not have been responsible for not collecting this note, as they would have been justified in considering it good. I believe it to be beyond

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question, that the executors should have collected the note in dispute if it could have been done by diligent effort.

But it is said, notwithstanding the evidence shows the makers of the note were considered by everybody to be solvent, yet in point of fact they were really insolvent. Insolvency is a very broad and general term as it relates to the different conditions of debtor and creditor. One's liabilities may be greater than his assets, in which case, he would be said to be insolvent, though he may have been in that condition for years, and yet paying all claims demanded of him. So a man may be said to be insolvent when he has nothing above exemptions which is subject to execution, and yet there are persons without number, in such condition, who are free from debt, who promptly meet every obligation and whose credit and standing is untarnished. There is, perhaps, no businessman but that in a moment can call to mind men who have no property above the exemptions, yet whose note for any reasonable sum is worth dollar for dollar. But according to the argument here, an executor would be excused from even demanding a debt from such person, notwithstanding the demand would have been complied with.

Therefore, before entering upon this question it may be well to look at the provision of the statute in this respect. It is provided (sec. 240) that an executor shall receive credit for all debts charged in the inventory where "the debtor was insolvent, or that, from any other cause, it was impossible for the executor or administrator to have collected such claim by the exercise of due diligence." There is no possible doubt but that the statute uses the word "insolvent," as meaning impossibility to collect. The insolvency must be such as that it is *impossible* to collect. The reading shows such to be the case. It says the executor shall have credit if "the debtor was insolvent, or that from any *other* cause it was impossible" to have collected the

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claim by due diligence. The insolvency must be such as to make it impossible.

Such is the view of the Supreme Court of this state. In *Williams v. Petticrew*, 62 Mo. 470, HOUGH, J., says: "The question, therefore, is one of fact, as to whether it was impossible for the administrator by the exercise of due diligence to have collected these notes at any time after he entered upon the administration." Again in same case he says: "But as the burden of proof was on the administrator to establish his right to credit for this note, he should have at least made it appear, that even by the exercise of a proper degree of diligence it would have been impossible to collect it." The same rule is also announced by the approval of an instruction in *Julian v. Abbott*, 73 Mo. 580, 582. What possible excuse to a trustee can insolvency be, if he can nevertheless collect the debt by demanding it? Is it possible that an executor may know that he can get money from the debtor on demand, and yet, because of the fact that he could not force it out of him by suit, he need not make the demand? Legal proceedings are a resort when other means will not avail. Insolvency must be the *cause* of not collecting. But aside from the statute, why should insolvency excuse a demand in this case? Even though the executors had known the true condition of the payors of the note, yet they were in high credit and standing, and how could the executors know but that they would not, by some means, pay the claim on demand. Insolvency of the debtor does not excuse demand in other cases. It is no excuse for want of demand of a promissory note in order to hold the endorser. 2 Daniels Neg. Inst., sec. 1171; Parsons N. & B. 446. All the books say that the holder of the note cannot know by what means he may be paid if he will make demand. A man may borrow the money, his friends may pay it, he may have made special provision for the specific debt, or it might otherwise be paid. *Fugitt v. Nixon*, 44 Mo. 295.

The slightest heed to the desire of the testator

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would have caused defendants to at least have demanded payment of this note. It is said in *Shultz v. Pulver*, 11 Wend. 365, that "the general rule is that all debts in the inventory, not designated desperate, shall be accounted assets in the hands of the executor or administrator; and in order to escape such accountability, he must show that they are desperate, or at least must show a demand and refusal." So in 5 Vesey, 843, the executors were held liable for a failure to make a demand, the court saying it was their duty to do so. In *Gaskell v. Harman*, 11 Vesey, 498, it is said, as a general rule, executors are under the necessity of getting in their testator's property, by all possible remedies; if any securities seem proper to be continued, the court alone, it has been said, must judge of that, and give the proper discretions; executors who take upon themselves to exercise the discretion on such points must be responsible for any loss sustained in consequence of their misplaced confidence, however good their intentions may have been. So in *Johnson's Estate*, 9 Watts & Serg., the executor failed to demand payment of a note or institute suit thereon for six months after it became due and he was held responsible for its loss, the proof showing it was collectible when due. "A mere application for payment, without more, would not have availed him. To entitle him to credit, he must, in addition, prove that he took legal steps to recover the sum due, or that, from the notorious insolvency of the debtor a suit would have been useless."

Now if we have in mind the provision of the will that the debts should be collected as soon as it could be done, it is apparent that due diligence required some effort to be made, by demand or otherwise, after the note became due, to collect; or if no such effort was made to, at least, show that effort would have been fruitless. The case concedes that there was no effort to collect; nearly the whole of the defendants' evidence is to show that the reason they did not endeavor to collect was that the payors were so thoroughly solvent and

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able to pay, they supposed they could get the money at any time and so let it run. It is evident that the executors did not think an effort to collect would have been fruitless, for, as I have just said, they supposed the money could be collected at one time as well as another. The question then resolves itself to this, do the defendants show that it was impossible to collect this note as directed by the will? They unquestionably do not; on the contrary, they show beyond cavil that it could have been collected on demand.

It is well to keep in mind that the executors were in charge of the estate on March, 1881, when the note fell due; that though living in the same community with J. B. Malone, who was in daily business as a banker, whose credit and standing was unbounded, they never asked him about the note till some four months after it became due and then never demanded payment, but acquiesced in his request to wait; that they did let it run without even so much as mentioning it to him for some eight months afterwards, when the bank, of which he was president, made an assignment. Thus the loan was allowed to remain, in the face of the will directing its collection, for a year after it became due. The evidence shows beyond all cavil or doubt, that Malone would have paid the note if it had been demanded or insisted upon. That he was a man who paid all claims against him on demand, is shown by the fact that his financial standing and credit was unbounded. The evidence shows that no man ever possessed the confidence of the business community up to the moment of his bankruptcy to a higher degree. He was considered "better than the bank." His financial standing was the power which run the wholesale establishment in Kansas City with a stock of from sixty thousand to one hundred thousand dollars. Could he have had such standing, and begot such confidence, without being a debt-paying man? The direct testimony of defendants' own witnesses is that the money would have been paid if payment had been insisted upon. But besides all this, the

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evidence shows directly that he was a "paying concern." The evidence discloses as shown by the list that he owed several notes to this estate. The executors testify that they collected one of three thousand dollars during this period. And as credit is asked for only one as uncollectible, it follows, the others were also collected.

This, then, is the case: The will directs the note to be collected as soon as it can be done; the executors accept the trust; the note is owing by a debt-paying man of the highest standing and credit; it becomes due and is allowed to run without any effort of any sort for a year, when it is lost by the total wreck of the payors.

It should be remarked that the evidence establishing the extraordinary character and commercial standing of J. B. Malone, and that the note would have been paid if demanded, comes from defendants. They have shown this on the theory that it was not negligence or imprudence in them to let the note run; but in this case it only fixes their liability the more certainly, for it demonstrates that if they had obeyed the will, the estate would have had the money. There is another theory upon which defendants should not be allowed this credit. It is shown by the testimony, expressed in the language of one of their witnesses, that "if payment had at any time been demanded prior to the failure of the bank the money would have been paid." It is further shown by undisputed testimony that when one of the executors was asking Malone about the note and Malone requested him to wait, "Hurt said it is good and I will risk it." In that remark, he sounded the keynote to the situation, and in the language of the books, if he concluded to interpose his own discretion for that of the testator, he must accept the consequences, however unexpected they may turn out to be.

I think the judgment ought to be affirmed, and HALL, J., concurring, it is so ordered. PHILIPS, P. J., dissents.

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PHILIPS, P. J., DISSENTING.—It is altogether important to a correct result in the investigation of this case that the facts should be fully stated and kept in mind.

This controversy arose on the application of the executors of the estate of Henry A. Powell to make final settlement. Said Powell died in September, 1880, possessed of a large estate of real and personal property. On his deathbed he made his last will and testament. He sent for the defendant, Payton Y. Hurt, who was his neighbor and close friend, and requested him to act, in connection with the testator's son, as executor of this will. Hurt was reluctant to accept this burden. The testator wished him to accept it without taking the commission allowed to such executor by the statute; but to receive only one and three-quarters per cent. in lieu thereof. On the instance of the testator, who had great confidence in the integrity and business judgment of Mr. Hurt, he finally consented to accept.

Among the assets coming to the hands of the executors was a note executed to the testator in his lifetime by C. H. Benedict, J. B. Malone, and R. A. Malone, dated March 12, 1880, due one year after date, for the sum of one thousand dollars, with interest from date at the rate of ten per cent. to be compounded annually, if not paid. In the final settlement offered by the executors they returned said note as insolvent, and asked credit therefor. Some of the heirs appeared and objected to this credit. Others of the heirs were willing that the executors should receive the credit. On the trial of this issue in the circuit court, whither the cause was taken on appeal from the probate court, this credit was disallowed, and the executors have appealed.

The evidence tended to show that shortly after the maturity of this note Hurt demanded payment thereof of J. B. Malone, at the Macon Savings Bank, of which bank J. B. Malone was president. The other makers of the note resided at Kansas City, engaged in mercantile

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business, under the firm name of "Benedict, Malone & Company," a firm composed of three makers of said note.

When the note was so presented to J. B. Malone he said, that owing to floods and high waters out west his concern at Kansas City had been unable to make collections, and as times were a little close in Kansas City, he requested the executor to wait on him a little while.

At the instance of this conversation, Wm. R. Powell—the co-executor—appeared, when Hurt advised him of the situation, and asked him: "What about time on the note?" or something to that effect. Powell at first expressed the thought that "perhaps they wanted time to get away with it." But on being advised that J. B. Malone was on the note, he seemed satisfied, as J. B. Malone was regarded by everybody in the community as perfectly solvent.

In the following February the Macon Savings Bank, to the great surprise of the business community, failed; and on the next day the mercantile house of Benedict, Malone & Company, at Kansas City, made an assignment for the benefit of creditors. The note in question was sent at once to Kansas City for suit against the makers; but nothing was realized on it out of the partnership assets, as the court held this note not to be a partnership obligation, and there were no partnership assets sufficient to pay the joint creditors. It was not a note of the bank, and consequently it was not provable against the receiver appointed for that concern.

The evidence showed that, as a matter of fact, the makers of this note had been insolvent for three or four years prior to its execution. The concern in Kansas City had in fact been doing business on the money of the Macon Savings Bank, which they used most freely for supporting the losing concern at Kansas City.

J. B. Malone was the active manager of the bank, and seems to have run its affairs as if individually controlled by him. Up to the time of the collapse in

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February, 1882, he was universally regarded in the community as perfectly solvent. Hurt himself kept his money in this bank and lost by its failure about three thousand dollars. And the evidence shows that a part of the monies paid over to these contesting heirs by the executors at the end of the first year of their administration, was lent by them to this bank, at seven per cent. interest, and was lost by the failure. The evidence also showed that at the time of Powell's death he held other notes on Malone then past due, which Malone voluntarily paid before the maturity of the note in question.

I. The duties of an executor are so well defined by the courts as to leave no room for controversy in this case as to the equitable rule in this jurisdiction. An executor is not an insurer of the claims coming into his hands. *Fudge v. Dunn*, 51 Mo. 264; *Foster v. Davis*, 46 Mo. 268. "The prevailing rule now established in this court is, that executors stand in the position of trustees to those interested in the estates upon which they administer, and are liable only for the want of due care and skill; and that the measure of care and skill required by them is that which prudent men exercise in the direction and management of their own affairs." *Merritt v. Merritt*, 62 Mo. 157. In the Fudge case, *supra*, the court quote approvingly the following language from highest judicial authority: "This court has always treated trustees acting in good faith with great tenderness. * * * If there was no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of anxiety and trouble, it is an act of kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, would be a manifest hardship; and would deter every one from accepting so necessary an office."

In these final settlements, in determining what credits shall be given and what charges made, in favor of

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and against the executor, the court exercises an especial function of equity. As said by COULTER, J., in *Kellar's appeal*, 8 Barr, 288: "It is peculiarly a branch of equity jurisprudence, where the conscience of the chancellor, enlightened and controlled by adjudicated precedents, is the umpire. * * * A court of chancery always deals with great tenderness towards a trustee, acting in good faith. * * * A slumbering credulity, or careless indifference, on the part of the trustee the law will not tolerate. He must do as a prudent man, under like circumstances, might do in his own case. It must be borne in mind that the office of administrator, executor and guardian, is one of the highest and most absolute necessity in society; and in the great majority of cases is undertaken more out of kindness and duty, than with any hope or expectation of emolument, and is attended in its faithful discharge with trouble, anxiety and hazard." So it is, in effect, said in *Neff's appeal*, 57 Pa. St. 96: All that justice, in the reasonable conservation of estates under administration, ought to exact of the administrator is common skill, prudence and caution, which an ordinarily prudent man exercises in the management of his own like affairs. This is approved by our Supreme Court in the Fudge case: "We look upon the administrator as the representative of the deceased, and if the deceased if alive, and acting as a prudent man, could not have prevented the loss, his representative ought to be exonerated under the like circumstances." If these rules are to be recognized in the consideration of this case I do not perceive how the executor is to be made liable for the loss of the money on the note in question. That he acted just as the intestate himself would have acted, if living, in respect of this debt, is manifest. At the very time of Mr. Powell's death he had money loaned to Malone then past due, showing his confidence in Malone's solvency. That Hurt in indulging Malone as he did acted just as an ordinarily prudent man would have acted in his own affairs is beyond debate. And this is the rule laid down

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by our Supreme Court, for the determination of this case. No other standard of diligence can be erected by this court.

II. The evidence shows that no man in that community enjoyed its entire confidence more than Malone. His credit seemed unlimited up to the hour of the final collapse of the bank. No one was pressing or suing him, to excite any apprehension on the part of Hurt, or to stimulate him to any special effort. He left his own money with this bank, just as these complaining heirs did their private money. The executor manifested proper diligence, for he did on the maturity of the note present it for payment. The excuse given by the debtor for not paying it then was a most reasonable one, and there was nothing in it whatever to excite any suspicion. The co-executor Powell, while apparently willing in this controversy that his share in the fund when distributed should be increased by mulcting Hurt (as he thinks Hurt would bear the loss, as he took the note for collection), yet, when he knew that Hurt was about to grant further time, or not to sue, he indicated his acquiescence when informed that J. B. Malone was on the note, thereby emphasizing the popular confidence in Malone's solvency, and approving the course taken by Hurt. That ninety-nine men out of a hundred, of prudence and care, would have acted in this matter just as Hurt did is too palpable for argument. The note was bearing ten per cent. interest compounded. There was no exigency of the estate demanding the collection of the money. A distribution was made among the heirs during the first year, and these very contestants loaned the money, or a part of it, to Malone's bank at seven per cent. interest. so that the probabilities are that if Hurt had collected this note the money would have gone back into the same place whence it came, and been there lost.

III. It is contended that it was the imperative duty of the executors to sue on this note immediately on its maturity. We need not controvert the general proposition that it is the duty of an administrator to convert

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into money *choses* in action. But we wholly deny that it is a fixed rule that, under any and all circumstances, this should be done, and if not so done the administrator acts at his own peril. No court has ever laid down such a rule. The very authority relied upon by respondents (*Charlton's appeal*, 34 Pa. St. [10 Casey] 475) says: "We do not desire to be understood as holding, that an administrator is bound to sue immediately a debt due his intestate, or encounter the hazard of personal liability for it; such is not the rule, but he is responsible for the want of ordinary diligence. When he has suffered years to pass by without any effort to collect such debt, or offering any excuse for his failure to proceed * * * we will not reverse the judgment." The facts of the case at bar bring it within the very terms which the opinion says will excuse it. If the rule were otherwise, it would run counter to the rule established by our Supreme Court, of establishing the administrator's liability by the test of what an ordinarily prudent man would do under like circumstances. It recognizes the right of exercising a discretion in every case, subject to the limitation as to its reasonableness, to be ascertained by the standard which governs the action of men, of common prudence, similarly situated.

Much has been said, both in the brief and oral argument of respondents' counsel, about the following clause in the testator's will: "Fourth. I direct my executors to collect all my notes and accounts due me as soon as the same can be done, and also convert all other personal property to cash within the first year of the administration or as soon thereafter as may be. I also direct my executors to sell my real estate just as soon as it can be done, and when the money is received, likewise distribute it among my children; and I leave the time, terms and manner of sale to the sound discretion of my executors, and give them express authority to execute, acknowledge, and deliver the necessary deeds of conveyance for said real estate."

It was at first contended that this provision made it

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absolutely mandatory on the executors to collect all the notes of the estate within the first year of administration. This was not tenable, for the obvious reason, that the direction as to the collection of notes and accounts was to do so "as soon as the same can be done." The direction as to the first year of the administration was as to the conversion into cash of "all other personal property;" and even as to that there was the qualification, "or as soon as may be done."

The first direction as to collecting notes and accounts was nothing more than what the law itself imposed, which is, that executors should proceed to collect debts due the estate promptly. And this remits us back in the discussion to the rule of reasonable discretion, and whether or not the executors in not bringing suit acted with that degree of diligence and prudence which a reasonably prudent man exercises under like circumstances. The evidence shows that within the first year of the administration a conference was held between the executors and heirs as to whether the land should be sold, and the estate wound up within that year. It was determined that it would not be for the best interest of the estate to do so. As there was no need of money to carry on the administration, and no money demanded by the heirs, and they were loaning the money distributed to them under the will to this very bank at a lower rate of interest than this note was bearing, and there was not even a suspicion of Malone's insolvency, the discretion exercised by the executors in not pressing the collection of this note was most reasonable, and was such as any prudent man would have shown under like circumstances.

IV. The authorities cited on behalf of respondents respecting the liability of trustees where they depart from the provisions of the trust instrument as to the manner of managing and investing the trust fund, or in changing the trust property from one character to another, have no application whatever to the facts and law of this case. In the case of such departures the trustee

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acts at his own peril, if the change or adventure prove disastrous.

V. The foregoing discussion has proceeded upon the hypothesis that this note could or might have been collected had the executors pressed its collection within the year. But the executors' claim to this credit rests upon a yet firmer ground, upon which there can be no possible legal or equitable assault. The uncontradicted evidence shows that during the whole time of this administration Malone was hopelessly insolvent. No witness pretended otherwise. The only witnesses who spoke to this matter were Rubey and Dysart. Rubey testified as follows: "All the makers of the note in controversy were insolvent prior to the death of Powell, and have continued to be so. As a matter of fact I do not believe the note in question could have been made by law out of the property of the makers at any time since the death of Powell; but if payment had been demanded prior to failure of the bank the money would have been paid, but it might have been with some other person's money. They might not have stood a suit for one thousand dollars. They might have paid it rather than been sued, but if so, it would have been paid out of the Macon Savings Bank with the bank's money."

Dysart testified: "Benedict and Malone were both insolvent during this administration. From my personal knowledge I am satisfied this could not have been made out of the makers thereof, or either of them, by law. If paid at all it would have been paid by the Macon Savings Bank. * * * There was nothing else to pay it with."

This is the whole of the evidence on which it is sought to hold these executors to account for a debt now of over two thousand dollars, on the ground of official neglect of duty. And what is this evidence, but the mere conjecture that Malone might have paid, in the opinion of the witness, if pressed, but the money would have been taken by him from the bank. He had no property, no money of his own; and if perchance he

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had met the conjecture of the witness—a bare supposition—it would have been done by wrongfully taking the funds of other people entrusted to the bank, and misapplying them to the payment of an individual debt. What right had the witness to presume that Malone would have thus committed a flagrant breach of trust? And upon what ethics, recognized by a court of chancery, should we feel constrained to adopt the mere opinion of the witness and predicate a decree upon such *mala fides* of this bank officer?

I submit that a court of equity, administering justice *ex aequo et bono*, ought not to adopt such a rule This evidence is not the proof of any substantial, reliable fact. No man's property, which it is the design of the law and the office of the courts to protect, should be swept away from him on mere conjecture—the mere speculation of a witness, when there is no possible means of ascertaining its truth. The supposition of the witness may or may not be well founded. How is a court to determine in advance whether it is or not? We might render judgment on such conjecture when the fact was, the debtor might not be thus scared into payment, or when he may have been unable or unwilling thus to wrong the bank? The property of the executor would under such a ruling be at the mere caprice—the opinion—of an irresponsible witness.

It is a fundamental rule of evidence that a witness must speak to actual facts, or not at all. Except in the instance of expert testimony, where the fact sought to be established is out of the range of tangible proofs, depending on some matter of science, or special experience, the mere opinion of a witness is incompetent; because it is an assumption of the province of the triers of fact, and because of the danger of basing a judgment on naked conjecture and surmises, instead of on existing facts. The witnesses who volunteered this speculative opinion gave no data, no tangible fact, for such surmise. There was not one word of proof that Malone had been coerced to make a single payment after

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the maturity of this note by any such threat. There is no evidence in this record that he had made any payment on any of his vast indebtedness maturing after this debt. The expressed opinion of the witnesses as to what might have happened, was not based upon, nor accompanied with, the presentation of any reliable fact to warrant any court in founding judgment thereon.

VI. I have always understood the law to be in the matter of such final settlements that, where the executor or administrator showed that the debtor was insolvent during all the time of his administration, he was entitled to the credit as a matter of course. And no case has been cited, after two arguments at this bar, where an administrator or executor has been denied the credit in such case. To hold him to an accountability for a failure to collect "as soon as can be done," when it appears that a resort to a suit, judgment, and execution, would be unavailing, would be to hold him to the letter of the law when the law itself afforded him no means of protection. If A should place claims in the hands of B to collect immediately, the implication of law would be, that he should have recourse to legal process as the effectual means to the end. And when he should show, when called upon by A for an account of his stewardship, that the debtor at the time he received the claim for collection was, and yet is, insolvent, his defence at law would be complete.

In *Potter v. McDowell*, 31 Mo. 73, it is declared: "That if all a man's debts cannot be collected by legal process out of his own means he is insolvent. * * * Whenever it is shown that a suit against an individual for a demand would be unavailing he is insolvent." In such case no return of *nulla bona* is required.

Our own statute recognizes the insolvency of the debtor as an unqualified excuse for failure on the part of the administrator or executor to collect. Section 240 provides, that: "At his final settlement, the court shall give credit to the executor or administrator for all the

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debts which have been charged in the inventory as due to the estate, if the court be satisfied that such debt was not really due to the estate, or that it had been balanced or reduced by offsets in any court of competent jurisdiction, *or the debtor was insolvent*, or that, from any other cause, it was impossible for the executor or administrator to have collected such claim by the exercise of due diligence." This statute in unmistakable terms declares that, if the "debtor was insolvent," the "court shall give credit to the executor or administrator." The court has no discretion in such case, for thus saith the law-making power of the state. The fact of insolvency of the debtor as much entitles the executor to the credit as if it appeared the debt was not really owing to the estate, as if it had been balanced or reduced by offset in a court of competent jurisdiction. These excuses for not collecting lie alongside of each other in the section of the statute, and the one is just as obligatory as the other on the probate court. To these unqualified grounds of excuse, entitling the executor to the credit, is added "any other cause," rendering it "impossible for the executor, etc., to have collected such claim by the exercise of due diligence."

The case of *Williams Adm'r v. Heirs of Petticrew*, 62 Mo. 460, is cited in support of the proposition, that, it devolves upon the executor to show affirmatively that, notwithstanding the insolvency of the debtor, he could not have collected the debt by the exercise of proper diligence. This is an entire misconception of the opinion. There were two debts for which the administrator asked credit. One was against a man named Clark, the other was against one Gilliam. Of the Clark debt the court say: "In regard to the Clark note, the testimony is conclusive, that from the time this note came to the hands of Williams as administrator, in 1861, Clark was and continued to be insolvent. We have no doubt about the propriety of allowing the administrator credit for this note." The court then proceeded to show that in respect of the Gilliam note there

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is more doubt, because the evidence did not show that during the whole time the administrator held it Gilliam was insolvent. When the administrator first had this note the debtor was not shown to be insolvent, and even after it came again into the hands of the administrator, the evidence shows, the administrator had secured, through a land trade, a debt due to the estate and a debt to himself. The evidence tended to show that there was a time during the administrator's possession of the note that he might have secured a part of it at least, as he secured part of an individual debt, out of the property of the debtor. It was in respect of this state of facts that the court said: "But as the burden of proof was on the administrator to establish his right to credit for this note, he should have at least made it appear, that even by the exercise of a proper degree of diligence it would have been impossible to collect it." As to the Gilliam note, it is manifest it came under the last clause of said section of the statute, "any other cause." But as to the Clark note, the testimony showing Clark's *insolvency* from the time the note came into the possession of the administrator, he was entitled to the credit as a matter of course.

The principles of law upon which I base my conclusions in this case have been recognized by the Supreme Court recently, in *Booker v. Armstrong*, 93 Mo. 49. The court again affirm the rule, that the measure of diligence required of an administrator is that which "a prudent man exercises in the direction of his own affairs." In that case the note which came into the hands of the administrator was secured by a deed of mortgage on real estate. The debtor was otherwise insolvent; and the court say: "But the Grove estate could not have suffered any loss by reason of the failure of the executor to prosecute a personal action against Pogue [the debtor], for *he was and still is insolvent.*" Thus again recognizing the principle that insolvency is a complete answer for the executor to make to a demand that he should account for such debt. But inasmuch as

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the executor held the note and mortgage for a number of years, without any effort to foreclose the mortgage, and negligently permitted the security to depreciate in value, he was held accountable to the extent of such depreciation.

VII. Against all this, the only argument interposed is, that the executor might possibly have induced the insolvent debtor to pay this note, not out of the property he owned, but by taking the money out of the vaults of the bank, held as a trust fund, and misapplying it to his individual debts. This he could only do in violation of a high trust, and in effect robbing his depositors to pay another man's debt. It occurs to me that a decision of a court bottomed upon such questionable morality would not be creditable.

VIII. On the other hand it seems to me that if ever there was a case where the salutary and reasonable rule of equity laid down by Lord Hardwicke should be applied this preëminently is one: "If there is nothing wilful in the conduct of the trustee, no *mala fides*, the court will always favor him. To subject him to losses which he could not foresee would be manifest hardship, and would be deterring every one from accepting such office." Not only that, but the respondents seek to make this executor answerable when it is in proof that he could not have made this debt by legal process. Every consideration of equity is in favor of Mr. Hurt in this controversy. Mr. Powell was his neighbor and friend, and pressed upon Mr. Hurt the acceptance of the burden of this administration against his wishes. He yielded only to oblige the dying request of his friend; and accepted the labor and responsibility for the meager pittance of one and three-fourths per cent. commission, when the statute would have allowed five per cent. Hurt was faithful to his dead friend and his heirs. He administered the estate with marked success and promptness; and turned it over to the distributees in good time, and with unusual small loss. For the heirs, under all the facts and circumstances surrounding

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this case, to demand that Hurt shall make good the one thousand-dollar note, with its accumulated interest, compounded, more than doubling the principal, is contrary to common right, and the dictates of an enlightened conscience. I cannot consent to the wrong and injustice.

The majority opinion being in conflict, in my opinion, with the line of decisions of the Supreme Court cited in this opinion, I ask that the cause be certified to the Supreme Court; which is accordingly done.

John S. Brown, Respondent, v. The Hannibal & St. Joseph Railroad Company, Appellant.

31a 661
32a 448
31 661
52 338

Kansas City Court of Appeals, July 2, 1888.

1. Practice—Pleading — Contributory Negligence — Matter of Defence and Must Be Pleaded—Case Adjudged.—Contributory negligence is a matter of defence and must be pleaded; yet if such negligence is not pleaded and the plaintiff's own evidence discloses a clear case of contributory negligence, he must fail in his action. But it was not error for the court to omit the hypothesis of contributory negligence in plaintiff's instruction as it did in this case.

2. —— —— Evidence Received Without Objection—Variance.—Unless there was a failure of proof of the cause of action, "in its entire scope and meaning," and when evidence complained of was received without objection this court will not reverse for such cause. In the case of a variance which may be cured by amendment, defendant's remedy is by affidavit proving to the satisfaction of the court that it was misled, as provided for by the statute. (Rev. Stat., sec. 3565.)

3. Damages—Measure of as to Loss of Wife's Society—How Determined.—There is no exact standard by which to measure the value of a wife's society. The amount to be recovered must be left to the enlightened judgment of the jury, who must, under the evidence before them, fix upon a reasonable sum.

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On rehearing.

4. PLEADING—ISSUES—INSTRUCTIONS MUST BE IN ACCORDANCE WITH THE ISSUES—CASE ADJUDGED.—It devolved on the defendant in this case to plead contributory negligence in order to raise such issue. The answer not having tendered such issue, and the evidence not being such as to justify the trial court in taking the case from the jury on the ground that plaintiff's evidence showed contributory negligence, it could not devolve on plaintiff in framing his instructions to submit such issue to the jury. Instructions must be drawn in conformity with the issues.

APPEAL from Clinton Circuit Court, HON. JAMES M. SANDUSKY, Judge.

Affirmed.

The case is stated in the opinion.

STRONG & MOSMAN and JOHN W. HENRY, for the appellant.

I. The court erred in refusing to direct a finding for defendant as prayed. There was a total failure of proof that the crossing was not a "good and sufficient crossing"; or that defendant permitted it to remain in a dangerous condition, or that plaintiff's wife was injured because of such condition. *Field v. Davis*, 27 Kan. 405. The plaintiff's own evidence showed that the casualty was caused by the carelessness of plaintiff's wife. *Buesching v. Gas Co.*, 73 Mo. 229; *Milburn v. Railroad*, 86 Mo. 109; *Lawrence v. Railroad*, 42 Wis. 322; *Fox v. Gastonbury*, 29 Conn. 204. There was no proof to connect the casualty with a defective crossing.

II. The court erred in giving plaintiff's instructions one and two. (*a*) Under these, the jury were bound to find for plaintiff, regardless of the evidence as to negligence of his wife, contributing to cause the accident. The court was bound to submit that question to the jury. They instructed the jury "to find the issues for plaintiff without being thereby further required to

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pass upon and consider the conduct of the plaintiff in the premises, and the plaintiff's knowledge, if any, of the broken tie-beam, and the unsafe and dangerous condition of the scaffolding. We do not think a conclusion upon the whole case was, under the issues and evidence, authorized by a finding of the facts thus submitted." *Sullivan v. Railroad*, 88 Mo. 181, 182. Each of these instructions purported to cover the whole case, and each is bad under the rule announced in Sullivan case, *supra*, following *Thomas v. Babb*, 45 Mo. 384; *Getz v. Railroad*, 50 Mo. 472; *Singer Co. v. Hudson*, 4 Mo. App. 145; *Henry v. Bassett*, 75 Mo. 89; *Bank v. Murdock*, 62 Mo. 70, 73, and cases cited. (*b*) In neither of these instructions are the jury required to find that, by reason of the other facts submitted, plaintiff suffered any damage, pecuniary or other. "An instruction which hypothecates a state of facts, and upon their existence directs a verdict, is improper, unless all the facts are hypothecated, which are necessary to sustain a verdict." *Thomas v. Babb*, *supra; Sullivan case*, *supra*, and cases therein cited. (*c*) There was error in each of these instructions in that it submitted to the jury the question whether the crossing was "reasonably safe and convenient for public travel", and also declared to them that the law required defendant to so construct and maintain it, as that it "would be reasonably safe, and convenient for public travel." This required more than was claimed in the petition, viz., in respect to convenience. This declared a duty not by law imposed on defendant. There was no evidence that the crossing was unsafe, and, therefore, that question should not have been submitted to the jury. (*d*) "In every case it must appear * * * that the person complaining was at the time in the exercise of ordinary care." *Tritz v. City*, 84 Mo. 645; *Craig v. Sedalia*, 63 Mo. 417; *Buesching case*, 73 Mo. 229. This question was not propounded to the jury in any form. *Gibson v. Railroad*, 76 Mo. 282. (*e*) The first instruction put the duty of defendant too broadly—and considering the

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evidence the jury must have been misled by the instruction. "Defendant was only bound to keep such parts of the road in repair as are necessary for the convenience and use of the traveling public." *Tritz v. City*, *supra; Streeter v. City*, 23 Mo. App. 250; *Craig v. Sedalia*, 63 Mo. 419; *Brown v. Glasgow*, 57 Mo. 157; *Bassett v. St. Joseph*, 53 Mo. 290; *Heckler v. St. Louis*, 13 Mo. App. 279; *Ellis v. Railroad*, 17 Mo. App. 131.

III. The court erred in giving plaintiff's third instruction. It does not limit damages recoverable within the allegations of the petition; and the court misled the jury in so failing to thus limit. *Wright v. Jacobs*, 61 Mo. 19; *Bank v. Murdock*, 62 Mo. 70; *Waldhier v. Railroad*, 71 Mo. 514; *Crews v. Lackland*, 67 Mo. 619. Besides, it is in conflict with the instruction given by the court of its own motion and must have misled the jury.

IV. The court erred in giving the instruction on its own motion, because it was in conflict with other instructions given, was variant from the petition, and does not limit the damages to such as are recoverable. It was error to submit to the jury to find plaintiff's "pecuniary loss arising from loss of wife's services or society," because there was not one word of testimony as to the value of her services or society. The jury were compelled to conjecture as to that. *Nichols v. Winfrey*, 79 Mo. 553; *Callahan v. Warne*, 40 Mo.; *Raysdon v. Trumbo*, 52 Mo. 35; *Givens v. Van Studdiford*, 4 Mo. App. 499. This error made the way plain for the wrong done defendant in the excessive verdict returned, viz., eleven hundred dollars.

V. The court erred in overruling defendant's motion for a new trial. The verdict was grossly excessive. Plaintiff gave no satisfactory evidence as to expending more than fifty dollars, and no evidence at all as to value of "services and society" of his wife, nor any data from which a plausible conjecture could proceed to measure his loss. He stated in his petition that the loss was for a period of three months only. It

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is absurd to say that he suffered pecuniarily on that account at the rate of more than four thousand dollars per annum. The verdict is, therefore, unsupported by evidence. The demurrer should have been sustained for reasons heretofore given. The court erred in overruling motion in arrest of judgment. The instructions changed the issues, enlarged the issues, ignored some issues, and introduced others, so that the whole record did not support or authorize the judgment. Defendant prays reversal of judgment on account of errors assigned in its said motions respectively.

Thos. J. Porter, for the respondent.

I. The court properly refused to direct a finding for the defendant as prayed. "To authorize such interference, the evidence must not merely be weak, but there must be no evidence." *Brink v. Railroad*, 17 Mo. App. 195, and authorities there cited. In passing upon a demurrer to the evidence, "the court is required to make every inference of fact from the evidence in favor of the party offering it which the jury might, with any degree of propriety, have inferred in his favor." *Buesching v. Gas Co.*, 73 Mo. 219; *Barton v. Railroad*, 82 Mo. 253; *Donohue v. Railroad*, 91 Mo. 357.

II. The pleadings raise no issue as to contributory negligence, and there could be no finding against the plaintiff on the ground of contributory negligence, unless "it clearly appears from the evidence, without any contradiction," that his wife was guilty of such contributory negligence as would preclude a recovery. *Drain v. Railroad*, 86 Mo. 574; *Petty v. Railroad*, 88 Mo. 306; *Donovan v. Railroad*, 89 Mo. 147; *Brown v. Railroad*, 23 Mo. App. 209. The case last referred to above rested upon the same facts as this, and the evidence is substantially the same.

III. The law presumes, in the absence of proof to the contrary, that Jane E. Brown was, at the time of the accident, exercising ordinary care and prudence, and

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she "had the right to presume that the crossing was reasonably safe and to act on such presumption." *Brown v. Railroad*, 23 Mo. App. 209; *Moberly v. Railroad*, 17 Mo. App. 518.

IV. There is no error in giving instructions one and two for plaintiff. They do not "instruct the jury to find the issues for the plaintiff," but submit to the jury all the issues made in the pleadings. The duties of defendant with respect to crossing of highways are defined by sections 765 and 807, Revised Statutes.

V. The question of contributory negligence is not in issue under a general denial. *Donovan v. Railroad*, 89 Mo. 147; *Sweigert v. Railroad*, 75 Mo. 475.

VI. Instructions should not be submitted upon an issue not made by the pleadings. *Vanhooser v. Berghoff*, 90 Mo. 487. But if required by the pleadings, the requirement is met by instructions given for defendant. *Muehlhausen v. Railroad*, 91 Mo. 346.

VII. Even if the instructions complained of are erroneous, a new trial ought not to be awarded where they worked no harm. *Brink v. Railroad*, 17 Mo. App. 197; *Keen v. Schnedler*, 92 Mo. 516; Rev. Stat., sec. 3775.

VIII. In estimating the expense incurred by reason of the injury, the jury were authorized to consider the necessary expenditure of money by plaintiff for hands to do his own work while he attended his wife. *Smith v. St. Joseph*, 55 Mo. 459.

ELLISON, J.—This action is for damages resulting to plaintiff by reason of personal injuries suffered by his wife resulting, as is alleged, from an unsafe, insufficient, and dangerous crossing constructed on a public highway across defendant's track. The answer was a general denial. There was a judgment for plaintiff for the sum of eleven hundred dollars and defendant appeals.

It appears from the evidence that plaintiff and his wife were moving from the south part of this state and were traveling westward in two farm-wagons at the time

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of the injury. Plaintiff was driving the wagon in advance and his wife was driving the other, following him; that they approached the crossing from the east, he passing over; that she drove upon the eastern approach, but in passing over the track down the western approach her wagon turned over, rolled down the embankment inflicting painful, if not serious injuries upon her.

The objections to plaintiff's first and second instructions are, that they did not submit the question of contributory negligence. Contributory negligence, as has been frequently held, is a matter of defence and must be pleaded. *Donovan v. Railroad*, 89 Mo. 147. It is true, as stated in *Milburn v. Railroad*, 86 Mo. 104, that though such negligence is not pleaded, yet if the plaintiff's own evidence discloses a clear case of contributory negligence, he must fail in his action. The question then in this case is, does the evidence for plaintiff show contributory negligence on the part of Mrs. Brown. It is shown she was an ordinarily good and careful driver; that the team was gentle, and that she had driven it one hundred and sixty miles. The crossing and its surroundings and condition is described by the witnesses with particularity.

Thomas Wright testified as follows: "I live near the crossing in question. The railroad crosses the state road, known as the Haynesville and Plattsburg road. Before the railroad was built, the road was level and safe. The road crossed a sort of bottom before the railroad was built. I have known it for forty years. I cross it every Sunday. I lived there at the time of the accident. I was road overseer; and the road was in my district. In crossing from the east, one has to keep to the south side of the east approach to avoid a hole, which is on the north side of that approach. When the track is reached, unless you are very careful, the wheel will drop down off the plank, and not strike solid ground. The plank extends twenty inches south, beyond the south brink of the west approach. The east

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approach reaches the track in a curve, and a hole on the north side compels bearing south, and throws travel towards the south brink of the west approach. There is more danger of going off the west approach, because the south brink of that approach is from three to four feet north of the south line of the east approach. To reach the west approach safely, one would have to bear off to the north, after getting on to the railroad track with a long wagon, but not so much with a short one. I measured the height of the fill on the south side of the west approach with a plank, and found it about seven feet. I saw the roadmaster and asked him to fill up the hole on the south side of the west approach; told him about two carloads of dirt thrown in there, so as to extend the west approach further south, would make the crossing safe. He did not do so. The plank on the west rail extends two feet beyond the fill, making the west approach. If one pays attention before getting on the track, he can go over without difficulty, but he must make a turn after getting on the railroad track. A long-coupled wagon has more trouble. I don't know whether I notified the roadmaster before or after the accident. Think it was before, but am not sure. Having my recollection refreshed, by reference to my former testimony in this case, I am satisfied it was before the accident."

On re-direct examination the witness said: "To be entirely safe in going over the crossing, it is necessary to make a turn some to the north after getting on the track, and drive the team beyond the plank on to the end of the ties, where they are not filled with dirt."

Monroe Treason testified: "I live one and one-half miles from the crossing and knew it in 1883, and passed just after the accident. The east approach comes up to the track in a curve. The crossing is wide enough if it was not for the curve, and the fact that the approaches are not opposite each other, one is liable to pull off if he does not watch. The south brink of the west approach is about four or five feet north of the

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south line of the east approach. In coming up from the east one does not see the danger until he gets upon the railroad track, and if one is not acquainted with its condition he is liable to go off. Travel is thrown to the south on the west approach. The approach is wide enough and about seven or eight feet high, but the planks at the rails do not extend far enough north to give a safe landing on the west approach."

Jesse A. Wright testified: "I have known the crossing for twenty years, and knew it in November, 1883. Coming from the east side the approach curves to the track, then goes straight. A hole on the north side of the east approach compels one to pull in one direction, and when the track is reached he must pull the other way. One cannot see over the track when coming up the east approach. The curve in the east approach and the hole in the north side of it throws the wagon too far south."

On re-direct examination, the witness said: "If a person continues straight west over from the east side it would not be safe. One can't see all the way over. Must pull north to get over safely, One not familiar with the crossing is in danger of going over."

William Mott testified: "I am familiar with the crossing in question. Have always known it. The east approach is in a curve. It is scant nine feet wide the way they had it fixed. One has to turn towards the left to avoid a hole on the north side of the east approach, which has the effect to leave the wagon near the south side. At the railroad track the fill is from seven to ten feet high. The approach on the east extends out eleven feet and on the west about fourteen feet. The planks on the track are pine and the south end was broken. The wagon wheel jumped off the rail about one foot down where the end of the plank is broken off. The sign-posts are west of the track, one south and the other north of the roadway. The sign extended over the road and was from twelve to sixteen feet long. A person cannot see the west approach from

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the east until on the railroad track. The sign-posts were about sixteen or eighteen feet from the track of the railroad. The surface of the west approach was not level, would call it oval. Started from the center of the traveled track toward the south."

J. D. L. Sparks, testified: "I know the crossing, and travel over it often. The road approached the railroad track in a curve from the east. The west approach is steep and narrow, and is further south than the east approach. Crossing from the east, one turns to the left. On reaching the railroad track of railroad the approach is in a curve. East approach is steep on the north side, and the west approach on the south side. Coming up, in a curve from the east, to avoid the steep place on the north side, with your team, the wagon is left near the south side. On reaching the track from the east, must turn north as far as team can go, in order to land safely on the west approach. Can't see the west approach, from the east, till the track is reached. A person driving in a covered wagon would have his view obstructed. Coming up the east approach, if you follow the direction given by the planks at the rails, you don't land on safe ground on the west approach."

On re-direct examination the witness said: "To get on to the west approach, one must go diagonally over the plank. To one knowing the track, and the necessity of keeping the team to the north of the track, it is no trouble to cross. Plank at crossing is about twelve feet long. One could cross anywhere on the plank. The bushes on the south side of the west approach are boxelder, briar, hazel, etc."

James E. Young testified: "I am acquainted with the crossing in question, have known it since 1867, and knew it in 1883. The public road crosses the railroad, at an angle from southeast to northwest. The approach is graded up several feet, and curves on each side of railroad track. On the west side is straight. On either side of the east approach were excavations. Don't know that it interfered with travel on east

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approach. It would not interfere with safe landing on west approach. There is some danger in getting down west side, to a stranger. The danger arises from the fill on the west side, not extending as far south as on the east side, and the curve in the east approach, which will throw one too far south on the west approach. Don't think the excavation would interfere with one, unless a stranger not knowing the west approach. The south line of the west approach is one to two feet further north than the south line of the east approach."

Re-direct examination: "I have passed over it quite often. A stranger not familiar with it is liable to go too far south. There is no danger if the west approach is known. There is no obstacle in making the approach good on both sides of the railroad. There is no danger at all on east approach, the only danger is in coming on the west approach. I knew the road before the railroad was built, it was a plain bottom road."

The cross-examination of these witnesses was substantially as their examination in chief, except they stated that if the wagon had been kept in the traveled track the accident would not have happened, but they also said that, to keep the wagon in the traveled track, the team must be pulled out of it, on account of the turn. They also said the traveled track could be kept by one who was acquainted with the crossing.

When we consider that Mrs. Brown had a right to rely upon the safety of the crossing, and that defendant had not performed its duty in constructing and maintaining it, I am unable to see anything in the foregoing showing a want of due care on her part. She could not see the condition or location of the west approach while she was driving up the east approach. "In coming up from the east one does not see the danger until he gets upon the railroad track, and if one is not acquainted with its condition he is liable to go off," is the language of one of the witnesses, which is in substance stated by all and contradicted by none.

To my mind the evidence for plaintiff makes out a

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remarkably clear case of neglect of a statutory duty on the part of defendant and fails *in toto*, to show any contributory negligence on the part of his wife. But it is urged that this evidence shows that if she had kept the wagon in the traveled track it would not have turned over. This is evident, but the testimony shows that on account of the east and west approaches not being opposite each other, and of the misleading position of the planks at the crossing, and that the danger could not be seen from the eastern approach, one unacquainted with the condition of the western approach will quite likely meet with just the accident that happened to Mrs. Brown. The evidence clearly establishes that if the horses drawing the wagon are kept in the track, the wagon, on account of the sharp turn, will go off. In order to avoid this the horses must be pulled sharply to the north, out of the traveled track. The inference to be drawn from all the testimony on this head, for plaintiff, is that one unacquainted with the western approach cannot cross with safety. This is in effect the statement of the witnesses, as expressed by one of them, "One not familiar with the crossing is in danger of going over." It will thus be seen that it was not error for the court to omit the hypothesis of contributory negligence in plaintiff's instructions.

The instructions are further objected to on the ground that they submitted to the jury the question whether the crossing was "reasonably safe *and convenient* for public travel." The primary meaning of the word convenient is fit, suitable, or adapted to use, and with this meaning it was not improper to use it in connection with the word safe.

Objection is made to plaintiff's third instruction, in that it does not limit the period of plaintiff's loss of service and society to three months, it being contended that the petition only claimed damages for a loss during that period. If we should concede that the petition is fairly subject to the interpretation given it by counsel,

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he is in no position to complain of the instruction. Evidence fully as broad as the instruction was received without objection. There was no failure of proof of the cause of action "in its entire scope and meaning," but if the matter was material, it was, at most, only a variance, which might have been cured by amendment if attention had been called to it. Defendant's remedy was by affidavit proving to the satisfaction of the court that it was misleading. Rev. Stat., sec. 3565; *Turner v. Railroad*, 51 Mo. 509; *Meyers v. Chambers*, 68 Mo. 626; *Wells v. Sharp*, 57 Mo. 56.

The further point is made against the instruction, in that it permitted a recovery for "costs of medicines," when the petition only charged "for nursing and medical attention." If we should concede this was a variance at all, the remarks made as to the other objection are equally applicable to this.

The instruction given by the court of its own motion as to damages is a copy of that offered by defendant, except that the court added, after the words, "pecuniary loss to the plaintiff," the words, "arising from his loss of her services or society." We can see no objection to such addition. It only makes clear what must or ought to have been intended by that offered by defendant.

As to the contention regarding the amount of the pecuniary loss to plaintiff for the loss of his wife's society, there is, as is said by counsel for plaintiff, no exact standard by which to measure the value of a wife's society. The amount to be recovered must be left to the enlightened judgment of the jury, who must, under the evidence before them, fix upon a reasonable sum.

Other points presented by defendant's counsel have been examined, but we have found nothing justifying a reversal of the cause. The evidence justifies the verdict.

The judgment, with the concurrence of the other judges, is affirmed.

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On rehearing.

Ellison, J.—On rehearing of this cause, it is argued that though contributory negligence was not pleaded, and though plaintiff's evidence did not clearly show contributory negligence on the part of his wife, so as to justify the court in taking the case from the jury under the authority of the *Milburn case*, 86 Mo. 104; yet if the evidence on the part of plaintiff *tended* to show such contributory negligence, it became an issue which should have been submitted to the jury.

This proposition has been presented by the distinguished counsel for the defendant with ability and evident earnestness, but, in my view, we are relieved from passing on the question by the fact that there is no evidence in the case on the part of plaintiff (and it is conceded that such evidence must appear in the testimony for plaintiff), either proving or tending to prove, contributory negligence.

Dr. McConnell, on cross-examination, stated that he was familiar with the crossing and found no difficulty in driving over in a buggy, day or night; that he had never driven a wagon over, and that a wagon, being longer-coupled, would be more difficult to get over. He added, "I *think* I could drive a wagon over it, but I never tried to do it."

Another witness stated that if a person was well acquainted with the crossing he could drive an ordinary farm-wagon over safely, but if he was a stranger he thought he could not. "Buggies and short-coupled vehicles are not so dangerous." Plaintiff's witnesses unite in saying, that the crossing was only safe for those who were acquainted with its peculiar condition and that one not acquainted with it is apt to go off, or turn over, or get hurt, or some equivalent expression. While they say there is no danger if you keep the wagon in the track, they, at the same time, say, one unfamiliar with the crossing is not apt to do this, as in order to do so,

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you must pull the horses sharply out of the track on account of the turn, and that this condition of the crossing cannot be discovered by one going up the east approach. "A person cannot see the west approach from the east until on the railroad track."

But, as I discussed the evidence somewhat in detail in the original opinion, I will not pursue the matter further now, and am in favor of affirming the judgment. PHILIPS, P. J., and HALL, J., concur in a separate opinion.

PHILIPS and HALL, JJ., CONCURRING.—We place our concurrence in affirming the judgment of the circuit court more particularly upon the ground, that the question raised on the rehearing of this case does not properly arise on the record.

It is conceded that, under the decisions of the Supreme Court, by which we are bound absolutely, it devolved upon the defendant to plead any contributory negligence of the plaintiff in order to raise such issue. Without such plea there could logically be no such issue of fact for the jury to pass upon. Matters not put in issue by the pleadings should not be submitted to the jury.

The answer not having tendered such issue, and the evidence not being such as to justify the trial court in taking the case from the jury on the ground that plaintiff's evidence showed clearly contributory negligence on the part of plaintiff's wife, it certainly could not devolve on the plaintiff in framing his instructions to submit such issue to the jury. Instructions must be drawn in conformity with the issues.

The plaintiff's instructions properly presented the questions of fact predicated in the pleadings. In all of them the jury were told, that if they found the facts, constitutive of the cause of action alleged in the petition, to exist, and that "in consequence thereof" and "whereby she was injured," they should find for the plaintiff. Under the issue of a general denial this is

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all that could be demanded of the plaintiff. And most certainly, if the defendant wished to raise the question presented on the rehearing of this case, it should have asked an instruction directed thereto, thereby affording the trial court an opportunity to pass upon it. It asked no such instruction. Every instruction asked by it was, in effect, given. The question we are asked to pass upon particularly is in fact raised for the first time in this court.

The judgment is affirmed.

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HENRY C. RAMSEY, Respondent, v. JOHN S. WEST, Appellant.

Kansas City Court of Appeals, July 2, 1888.

1. **CONTRACT—INTERPRETATION—OWNER AND BROKER—CASE ADJUDGED. The broker in this case contracted with defendant to procure a purchaser of his land, able, ready, and willing at the sum named by the owner. *Held*, that a contract with a purchaser, which was not binding on the latter, because of a condition in it that it was to be void if the first of several payments should not be made within the stipulated time, did not fulfil the contract so as to entitle the broker to his commissions.**

2. **——— ——— CASE ADJUDGED.—The contract with the purchaser in this case provided for payments by instalments, and that upon failure by the purchaser to pay or tender the first instalment "then this agreement shall be wholly void and shall cease to be binding on either of the parties hereto." *Held*, that the purchaser might elect to treat the contract at an end upon failure of the condition, as well as the owner, and that the contract, thereafter, is binding upon neither.**

On rehearing.

3. **——— ——— BROKER'S COMMISSIONS—WHAT NECESSARY TO ENTITLE HIM TO THEM.—The broker must be the procuring cause of the contract on which he depends for recovery. It will not suffice for his act to be one of the chain of causes producing the contract; it must be the procuring or inducing cause; or, as it has been said, it must be the *causa causans*. (Ewell's Evans on Agency, 341).**

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APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Reversed and remanded.

W. J. WARD, for the appellant.

I. The court erred in refusing the first instruction asked by defendant. (1) Because plaintiff did not show that he ever spoke to purchaser in regard to defendant's property, or said, or did anything to induce him to buy it. *Armstrong v. Winn*, 29 Minn. 126. (2) Because, even if plaintiff made the contract offered in evidence, it could not be enforced by the owner, and the purchaser abandoned it and refused to carry it out. Plaintiff not being the procuring cause of the sale (made more than one year and a half afterwards), is not entitled to commission. *Earp v. Cummings*, 54 Pa. 394; *Armstrong v. Winn*, 29 Minn, 126; *Wylie v. Bank*, 61 N. Y. 415; *Sibbold v. Bethlehem I. Co.*, 83 N. Y. 378. (3) Because the evidence showed that plaintiff had nothing to do with the final sale, but that it was procured by other agencies. *Harris v. Burtnett*, 2 Daly, (N. Y.) 189; *Armstrong v. Winn*, 29 Minn. 126; *Earp v. Cummings*, 54 Pa. 394.

II. Conceding that Ramsey made the contract offered in evidence between Shaeffer and West the testimony of Ramsey, Ess and West all show that it was not carried out by Shaeffer, and Ess and West both testified that a new bargain for a different amount was made between Shaeffer and West long after Shaeffer had repudiated the claimed Ramsey contract, and for causes outside of Ramsey's agency, and no one testified to the contrary. Under such circumstances Ramsey could not recover, and this court has said that "where the facts are undisputed or clear the court should apply the law and determine the case," and defendant's first instruction should have been given. *Powell v. Powell*, 23 Mo. App. 365; *Lomas v. Meeker*, 25 N. Y. 361; *Railroad v. Stewart*,

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57 Tex. 166; *Rowland v. Plumer*, 50 Ala. 182, 195; *Hubert v. Butler*, 97 U. S. [7 Otto] 319.

III. Defendant's first instruction should have been given, for, admitting that Ramsey made the contract and admitting that Shaeffer would not have heard of the defendant's land if it had not been for Ramsey, yet if Ramsey did not make a sale to him, but only an optional contract that Shaeffer would not carry out, and long after that transaction had been repudiated by him, he of his own motion bought the land, Ramsey cannot recover. *Sibbold v. Bethlehem I. Co.*, 83 N. Y. 378, and cases cited above.

IV. The contract offered in evidence in this case is an optional or unilateral contract. *Fue v. Houghton*, 6 Col, 324; *Kimberly v. Henderson*, 29 Md. 512; *Bradford v. Limpus*, 10 Iowa, 35.

V. Defendant's fifth instruction should have been given, for plaintiff's own witnesses testified that if West's statement was true that Shaeffer had first offered to buy from him there was no custom as to commission under such circumstances. *Potts v. Aechturnacht*, 93 Pa. 138; *Murry v. Curry*, 7 Car. & Payne, 584.

VI. It was not improper for defendant to assume in his fifth instruction that there was no custom as to commission if Shaeffer had applied to him first in the purchase of his land, for plaintiff's own witnesses testified that under such circumstances there was none and their testimony was not disputed. *Carroll v. Railroad*, 88 Mo. 239; *Powell v. Powell*, 23 Mo. App. 365; *Lomas v. Meeker*, 25 N. Y. 361; *Railroad v. Stewart*, 57 Tex. 166; *Rowland v. Plumer*, 50 Ala. 195; *Price v. Haberle*, 25 Mo. App. 205.

VII. The fourth instruction of defendant was not given as asked, but as no exception to the charge made by the court was saved, of course it is too late to object now.

VIII. Plaintiff's instruction should not have been given, because there is no testimony to show that plaintiff made the sale of defendant's land. He could only

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have a claim against defendant on the ground that he made the contract with purchaser, and that it was binding; or that by bringing the property to the purchaser's notice defendant was enabled to make the sale,—neither of which grounds the instruction covers. Besides, the instruction would naturally mislead the jury, because it says nothing of the final sale in which plaintiff took no part. It does not cover the whole case, and is, therefore, improper. *Hoffman v. Parry*, 23 Mo. App. 20; *Ellis v. Waggoner*, 24 Mo. App. 407.

IX. Defendant should have been allowed to read the letter written to plaintiff, as plaintiff had testified about it.

WARNER, DEAN & HAGERMAN, for the respondent.

I. The plaintiff's instruction was rightly given, and defendant's first instruction rightly refused. The plaintiff's instruction told the jury that if the plaintiff was employed by the defendant to procure a purchaser at a stated price, and he procured such purchaser, and that he was to receive the usual and ordinary commission, then he was entitled to recover the usual and ordinary commission on the purchase price of the land. The plaintiff's testimony was, that the defendant employed him to sell the land, and he told the defendant he would charge him two and one-half per cent. commission, and the defendant said, "Go ahead, you will have your commission." The witnesses, Whipple, Lippincott, and Lee, each testified that the usual commission at Kansas City, where the sale was made, on such a sale was two and one-half per cent. on the purchase price. There was no testimony offered by the defendant tending to contradict the plaintiff's testimony as to what was the usual and ordinary commission.

II. Where a real estate agent makes a sale of land, he is entitled to the usual commission established by usage at the place where the sale was made. *Kock v. Emmerling*, 22 How. (U. S.) 69. And when the agent procures a purchaser ready to buy on terms satisfactory

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to the owner, he is entitled to his commission. *Ibid.; Veener v. Harrod*, 2 Md. 63; *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Barnard v. Monnot*, 34 Barb. (N. Y.) 90.

III. Where the broker negotiates the sale of real estate he is entitled to his commissions, though owing to the default of his employer the sale is never effected. *Carpenter v. Rinders*, 52 Mo. 278; *Timberman v. Craddock*, 70 Mo. 638; *Bell v. Kizer*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Beauchamp v. Higgins*, 20 Mo. App. 574.

IV. But it is claimed that the written contract in this case was nothing but an optional contract so far as the purchaser was concerned and was not binding on him; and, therefore, no contract for the sale of the land was in fact made. We submit, if such were the true construction of the contract, it could not affect the plaintiff's rights to his commission. Whatever the contract between Shaeffer and plaintiff, it was adopted by West and signed personally by him; it included the terms on which he was willing to sell. It was his contract, not that of his agent. If the plaintiff had made the written contract, and negligently and intentionally put it in such form that it did not bind Shaeffer, it might be reasonable that he should forfeit his commission. When, however, the defendant himself made the contract, he cannot complain if as made it did not bind the purchaser. The only duty of plaintiff, as defendant's agent, was to find him a purchaser who was willing to buy on the terms proposed by the defendant. The defendant is concluded in this suit for commissions to say that the contract was not upon the terms intended and authorized by him. All of the authorities agree that the agent is only required to produce a purchaser, ready and willing to contract with the owner on the owner's terms. We contend, however, that the written contract referred to was binding on both Shaeffer and West, and Shaeffer's failure to pay the five thousand dollar payment did not release him from the obligations imposed

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upon him by the contract. The provision in the contract to the effect that if Shaeffer failed to pay the five thousand dollars on or before the time stipulated, that the agreement was to be wholly void, must be construed to mean that it should be void at the election of West, the owner. Certainly the contract was binding on the purchaser. *Clark v. Jones*, 1 Denio [N. Y.] 517; *Canfield v. Westcott*, 5 Cowen [N. Y.] 270; *Marcius v. Sargent*, 5 Cowen [N. Y.] 271; *Church v. Ayres*, 5 Cowen [N. Y.] 273. The true rule is that a contract to the effect that it shall become void between the parties upon nonpayment or other nonperformance is for the benefit of the obligee, and the obligor cannot avail himself of it. *Mason v. Caldwell*, 5 Gil. [Ill.] 196; *Barbour's Exr's v. Brookey*, 3 J. J. Marsh. 511; *Wilkerson v. Still*, 4 Pac. Rep. [Cal.] 629; *Cartwright v. Gardner*, 5 Cush. [Mass.] 281.

V. The fifth instruction was rightly refused. It attempted to single out an alleged fact, namely, that plaintiff had, previous to his employment by defendant, been offered by the purchaser, nineteen thousand two hundred and fifty dollars as diminishing plaintiff's compensation, though there is no pretense that defendant ever notified the plaintiff that he had such offer or that plaintiff knew of such offer. The testimony of plaintiff's witness Whipple, is that under the usage the previous offer would not diminish the compensation, but the agent would be entitled to the commission on the entire purchase price. This instruction was also glaringly erroneous in that it concludes by saying the jury "will only find for plaintiff such sum as they may think his services were reasonably worth." The purpose of the draftsman evidently was to have the jury guess at the measure of plaintiff's compensation, while the undisputed testimony shows that the recovery of the plaintiff, if anything, should have been the usual commission, which was indisputably proved to be two and one-half per cent. The jury had to find, not what they might think was reasonable, but what they might

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find or believe from the evidence to be reasonable. As we have seen in considering plaintiff's instruction the plaintiff was entitled to recover the usual and customary commission. *Kock v. Emmerling*, 22 How. 69-24. The fifth instruction was squarely in conflict with the doctrine established by that case.

VI. In conclusion, we submit: The verdict and judgment was just in its results. Plaintiff procured the purchaser, a binding contract was made between him and the owner on terms satisfactory to both. Litigation arose between the owner and purchaser, suits and counter-suits were brought, and finally the sale was carried out substantially as originally agreed on, and the defendant deeded the land and received the purchase price, which was the fruit of the plaintiff's work in originally securing the purchaser. "The laborer is worthy of his hire." The jury found that defendant's claim that he had never employed the plaintiff, and that he alone had made the sale, was untrue.

Hall, J.—This suit was brought to recover five hundred dollars as broker's commission for selling the defendant's land to one Saumel Schaeffer, for twenty thousand dollars. The evidence tended to show that, through the aid of plaintiff, acting as a broker for the defendant, under employment by the latter, the defendant entered into the following agreement with Schaeffer:

"This agreement, made this twenty-fifth day of July, 1882, between John S. West, of Kaw township, Jackson county, Missouri, of the first part, and S. C. Schaeffer, of Lancaster, Ohio, of the second part, witnesseth: That in consideration of the sum of twenty thousand dollars, to be paid as hereinafter specified, the receipt of five dollars of which is hereby acknowledged, the said John S. West has, this day, sold in fee-simple to the said S. C. Schaeffer, the following described premises, situate in Kaw township, Jackson county, Missouri, containing seventy-nine acres, less

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the right of way granted to the Chicago and Alton Railroad and the Kansas City and Suburban Railroad, both not exceeding ten acres, being what is known as lot number four in the proceeding of the circuit court, of Jackson county, Missouri, for the partition of the estate of Thomas West, deceased, amongst his heirs and widow, dated October 18, 1880. For a more definite description of said premises, reference is made to aforesaid partition proceedings; and the said S. C. Schaeffer for himself and assigns agrees, subject to the condition hereinafter named, to pay the said sum of twenty thousand dollars, as follows: Five thousand dollars on or before the first day of February, 1883, and the balance in three annual payments of five thousand dollars each, with six per cent. interest from the first day of February, 1883. Upon receipt of the first payment of five thousand dollars the said John S. West for himself or his heirs and assigns, agrees to execute and deliver to the said S. C. Schaeffer or his assigns a deed of general warranty for said premises as above specified with abstract of title for the lands and premises above named, to be satisfactory to said Schaeffer or his assigns, and at same time the said Schaeffer, or his assigns, shall execute and deliver to the said John S. West bond or notes for the deferred payments, to be secured by mortgage on the premises so conveyed.

"It is understood if the said Schaeffer or his assigns shall neglect or fail to pay or make tender of the first payment of five thousand dollars on or before the time stipulated, then this agreement to be wholly void and shall cease to be binding on either of the parties hereto.

"JOHN S. WEST. [seal.]
"S. C. SCHAEFFER. [seal.]

"Attest: H. C. RAMSEY."

The plaintiff was employed by the defendant to procure a purchaser for his real estate at the sum of twenty thousand dollars. The court tried the case on the theory that the plaintiff by engotiating the contract

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set out above performed his contract with defendant. The question is thus presented, was that contract such a contract as the plaintiff was employed to negotiate? The plaintiff contracted to procure one able, ready, and willing to purchase the defendant's land at the sum named. The question may, therefore, be thus stated, was the contract entered into between the defendant and Schaeffer binding upon the latter to purchase the land at the sum of twenty thousand dollars? The question must be answered in the negative.

The condition of the contract with which it concludes in express words is made for the benefit of both the parties thereto. While the principle invoked by the plaintiff's counsel, "it is a far-reaching principle of common law that a party shall not be allowed to take advantage of his own wrong, and courts will not so construe the contract as to enable" the party committing the wrong to take advantage of it, is a sound principle and firmly established, it has no application to a contract whose language gives no reason for construction, and is susceptible of only one meaning, and that meaning is that the party failing to comply with one of the terms of the contract may, as well as the other party, on the happening of the failure elect to put an end to the contract. Because, although the principle of construction should be given full force, it cannot authorize the court to make a new and distinct and different contract for the parties. The contract in this case clearly provides that Schaeffer, upon failing to pay or tender the first payment provided for thereby, might elect to treat the contract as at an end, for the words are, "then this agreement to be wholly void, *and shall cease to be binding on either of the parties hereto.*" On no ground can we refuse to give the force, effect, and meaning to these words which they plainly intend. In this case Schaeffer failed to make the first payment called for in the contract, and afterwards refused to carry out the contract and complete the purchase under it.

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For this reason the judgment must be reversed unless it be for the point made by counsel for the plaintiff that the defendant, by accepting and approving the contract in evidence, must be presumed to have accepted it as such a contract as the plaintiff agreed to negotiate, and, therefore, as performance by plaintiff of his duty. This point, for the reason given by us in *Reiger v. Bigger*, 29 Mo. App. 421, we must hold as untenable.

Judgment reversed and cause remanded. All concur.

On rehearing.

HALL, J.—We adhere to the original opinion in this case.

In support of our conclusion that the contract referred to in the opinion is an optional contract, we cite *Bradford v. Limpus*, 10 Iowa, 35. We wish, also, to say that a careful reëxamination of the authorities cited by the counsel of plaintiff shows that they do not apply to this contract, the peculiar language of which we sufficiently noticed in the original opinion. If the words used in the contract do not convey the meaning given them by us, it would be difficult to conceive words that would do so.

We desire to add something to what was said in that opinion as to the theory on which the court tried the case. The fact is, that, after the making of the contract set out in the foregoing opinion, the defendant made a sale of his property to Schaeffer. The sale was made about one and a half years after the making of the contract. In the meantime, Schaeffer having refused to purchase the land, the defendant had instituted a suit against him for damages on account of such refusal, which he had dismissed before trial, and had instituted a second suit on the same ground, which was at the time of the sale undisposed of; and Schaeffer had instituted a suit against the defendant on the attachment bond given in the first suit, an attachment having been issued

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in that suit, and also on account of the contract between the defendant and himself. Schaeffer's suit was also pending at the time of the final sale, and it and the last suit brought by defendant were both dismissed after the final sale of the land. There was no evidence that the final sale and the dismissal of the two suits were the result of a settlement of the parties. On the contrary, all the express evidence on the subject was to the effect that Schaeffer denied emphatically the binding effect of the contract procured by the plaintiff, and refused, in any manner, to recognize it as of any force. Between the making of the contract and the final sale of the land, so far as the record discloses, the plaintiff did nothing to procure a sale of the land.

On such facts, the court gave the following instruction for the plaintiff:

"The court instructs the jury that if you believe, from the evidence, that the defendant employed the plaintiff to procure for him a purchaser of the real estate described in the evidence at and for the sum of twenty thousand dollars, and that plaintiff did procure a purchaser of such real estate at and for the said sum, or a greater sum, and that plaintiff was to receive the usual and ordinary commission for finding such purchaser on the purchase price paid for said real estate, then you will find for the plaintiff so much as you find to be the usual and ordinary commission on the purchase price of the real estate aforesaid."

We thought, and still think, that this instruction does not refer to the final sale of the land, but that it refers to the contract between the defendant and Schaeffer, which was procured by the plaintiff. It was in accordance with this understanding of the meaning of this instruction that we said that the court tried the case on the theory that, by procuring the contract mentioned, the plaintiff performed his contract with the defendant.

But if we are wrong in this view of this instruction, and if the instruction does not refer to the final

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sale of the land, we think the instruction defective and misleading in not plainly telling the jury that in order to find for plaintiff they had to find that the contract was the inducing or procuring cause of the sale finally made. There was no evidence of anything done by the plaintiff to procure that sale but the procurement by him of that contract. Under such evidence, if the jury understood the instruction to refer to the final sale, they must have also understood that, because the plaintiff procured the contract, and the sale, in point of time, was subsequent to the contract, they might find that the plaintiff procured the sale. This is not the law. The broker must be the procuring cause of the contract on which he depends for his recovery. It will not suffice for his act to be one of the chain of causes producing the contract; it must be the procuring or inducing cause, or, as it has been said, it must be the *causa causans*. Ewell's Evans on Agency, 341.

For this reason, with the concurrence of the other judges, the judgment is reversed and the cause remanded.

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BY E. A. LEWIS.

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1. COMPENSATORY DAMAGES.—Where the defendant gave a written acknowledgment that the title of certain real estate was held by him in trust to indemnify the plaintiff against liability as surety for a third person on an appeal bond, with an undertaking to devote the property or its proceeds to such indemnification, a suit by the plaintiff on account of defendant's sale of the property and diversion of the proceeds, in consequence whereof the plaintiff was compelled to satisfy the appeal bond without indemnity, is an action at law, and the plaintiff's recovery can be of compensatory damages only. *Bush v. Haeussler*, 47.

2. TRUSTEE OF EXPRESS TRUST.—The payee of a promissory note who is named therein as trustee for another, may maintain an action on such note in his own name, without regard to the question whether the beneficiary be living or otherwise. *Beck v. Haas*, 180.

3. CONTRACT—SETTLEMENT.—The plaintiffs contracted to make and furnish railroad ties out of timber belonging to the defendant, and were to be paid a fixed price for such as were accepted by a designated inspector. Nothing was said about any payment for "culls," meaning such ties as should not be so accepted. The parties settled in full for the accepted ties at the end of each month, and a final settlement and payment in full were made at the end of all their transactions. But the plaintiffs never at any time demanded payment for culls, until the institution of the present suit, in which they claim compensation for the culls made by them and left upon the ground. *Held*, that nothing appears upon which plaintiffs have a right of action. *Lindersmith v. South Mo. Land Co.*, 258.

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ACTION—Continued.

4. FRAUDULENT REPRESENTATIONS.—An action based upon the deceit or fraudulent representation of another cannot be maintained in the absence of proof that the party making them believed, or had good reason to believe, at the time he made them, that they were false; or that he assumed that he had actual knowledge of their truth, though conscious that he had no such knowledge. *Koontz v. Kaufman*, 397.

5. RIGHTS OF MORTGAGEE AGAINST PERSON SUING OUT WRONGFUL ATTACHMENT.—Persons holding a second mortgage on personal property wrongfully attached may recover from the attaching creditor damages caused by the diminished value of the property. They are entitled to the property remaining after satisfaction of the first mortgage, and the person wrongfully attaching rendered himself liable to the extent of their loss thus wrongfully brought about by him. The subjecting of the property by the first mortgagees to their debt does not affect the right of the second mortgagees to this action. *Taylor v. Hines*, 622.

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1. WHAT ASSETS SUBJECT TO DEMANDS OF CREDITORS.—In a proceeding against an administrator to compel payment of a judgment which has been ordered by the probate court to be paid in the regular course of administration, the creditor can make no claim upon assets which the administrator had disbursed to distributees and for expenses of the estate, before the creditor's demand accrued. But where the administrator has collected rents from lands previously partitioned to some of the distributees, and, having incorporated them with the funds of the estate, has disbursed the amounts in the course of his administration, and has afterwards collected the amount of a judgment against the representatives of a former grantor for breach of a covenant of warranty attached to the lands, the sum so collected is not to be regarded as a trust fund in the administrator's hands for the benefit of the distributees whose rents were received and disbursed by him, but must be treated as assets of the estate, liable for satisfaction of the judgment which the probate court has ordered to be paid. *Tyler v. Priest*, 272.

2. LIABILITY OF EXECUTORS.—Executors and administrators stand in the position of trustees and are liable only for want of due care and skill; and the measure of care and skill required of them is that which prudent men exercise in the direction of their affairs; the care must be graduated according to the character of the property, its value, and the convenience of its being made secure, the facility of its being stolen and the temptations thereto. *Atterberry v. McDuffe*, 603.

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ADMINISTRATION—Continued.

3. DUTIES OF EXECUTOR.—It is the duty of the executor or administrator of an estate to diligently and speedily collect the debts due the estate, especially such as are out on personal security only, pay the debts of the deceased and distribute the residue to the heirs or legatees; and the executor or trustee will become personally liable, if he does not get in the money within a reasonable time. *Powell v. Hurt*, 632.

4. INSOLVENT DEBTORS.—Under section 240, Revised Statutes, providing that an executor shall receive credit for all debts charged in the inventory where "the debtor was insolvent, or that from any other cause, it was impossible for the executor or administrator to have collected such claim by the exercise of due diligence," the word "insolvent" is used as meaning impossibility to collect. *Powell v. Hurt*, 632.

5. DEMANDING PAYMENT.—The general rule is that all debts in the inventory, not designated desperate, shall be accounted assets in the hands of the executor or administrator, and in order to escape such accountability, he must show that they are desperate, or at least show a demand and refusal. He should take legal steps to recover unless from the notorious insolvency of the debtor a suit would be unavailing. *Powell v. Hurt* 63°

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1. HUSBAND'S AUTHORITY AS WIFE'S AGENT.—Where it appears that a husband was general agent for his wife in all matters pertaining to a particular business, any special limitation upon his authority which is unknown to a party dealing with him in such business, cannot be shown in evidence so as to affect the rights of such party. *Bates v. Holladay*, 162.

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AGENT—Continued.

2. DECLARATIONS OF AGENT.—While loose declarations of an agent, made to the whole country around, should not be detailed in evidence to affect the rights and liabilities of his principal, yet the admission of such declarations will not be deemed prejudicial, when it appears that they referred to matters within the scope of his agency, and that their effect is confirmed by other evidence in the cause. *Bates v. Holladay*, 162.

3. EVIDENCE.—Proof of agency by the testimony of the agent is admissible, except in the case of a husband or wife testifying, one for the other, on the score of agency, in which case the agency must be proved by other evidence. *Deane Steam Pump Co. v. Green*, 269.

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ATTACHMENT.

APPEAL FROM JUDGMENT ON PLEA IN ABATEMENT.—Under section 439, Revised Statutes, it is permitted to a plaintiff, against whom judgment has gone on the plea in abatement, to take an appeal therefrom without awaiting final judgment on the merits. But where the judgment goes against the defendant on such plea, he must save his exceptions thereto, file bill of exceptions, and await the judgment on the merits before he can appeal. *Metzenberger v. Keil*, 130.

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1. OWNER AND BROKER.—A broker contracted with the defendant to procure a purchaser of his land, able, ready, and willing at the price named by the owner. *Held*, that a contract with a purchaser, which was not binding on the latter, because of a condition in it that it was to be void if the first of several payments should not be made within the stipulated time, did not fulfil the contract so as to entitle the broker to his commissions. *Ramsey v. West*, 676.

2. REAL ESTATE BROKER.—In order to entitle a real estate broker to commissions for the sale of property intrusted to him, he must complete the sale; that is, he must find a purchaser in a situation and ready and willing to complete the purchase on the terms agreed on. Then he will be entitled to them, although the vendor should refuse to go on and perfect the sale; or the vendee should so refuse, if the sale is by a valid and binding contract between vendor and vendee, without any fault on the part of the vendor. *Love v. Owens*, 501.

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2. ESTOPPEL.—The validity of a contract may be so far recognized by the other party to it, that such acts may operate so as to create an estoppel—especially if something is done on the faith of such recognition. *Imboden v. Detroit F. & M. Ins. Co.* 321.

3. OPINION OF WITNESS.—A contract provision requiring that the superintendent's opinion, certificate, report, and decision on all matters shall be binding and conclusive on the principal contractors, does not bind the plaintiff subcontractor to an estimate or opinion given by the superintendent as a witness in the trial of the cause. *Fitzgerald v. Beers*, 356.

4. SIGNING BY ONE PARTY—ACCEPTANCE.—Although one of the parties to a contract does not sign it,—but only the party of the other part,—still if the party not signing accepted the contract and performed the services therein called for, there is no merit in the objection that it was not signed by her. *Stone v. Rennock*, 544.

5. TIME OF PAYMENT.—The fact that the entire compensation fixed by the contract was to become due and payable on the death of one party does not render the contract void as being against public policy. *Stone v. Rennock*, 544.

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CONTRACT—Continued.

6. REAL ESTATE BROKER—TERMS OF EMPLOYMENT.—Where the owner fixed only one term of the proposed sale of his real estate, all other terms were left open to be afterwards fixed by him at his pleasure. But the brokers were only required, by their contract, to find a purchaser at the price fixed by the owner, on such terms, in other respects, as might be agreeable to him. *Millan & Abbott v. Porter*, 563.

7. DUTY OF BROKERS IN NEGOTIATING SALE.—The duty of a real estate broker, under an ordinary contract of employment, is to procure a purchaser on the owner's terms, and bring the two together. He is not bound to negotiate the trade, nor to make the actual sale. *Millan & Abbott v. Porter*, 563.

8. FAILURE OF CONDITION.—The contract with a purchaser provided for payments by instalments, and that upon failure by the purchaser to pay or tender the first instalment "then this agreement shall be wholly void and shall cease to be binding on either of the parties hereto." *Held*, that the purchaser might elect to treat the contract at an end upon failure of the condition, as well as the owner, and that the contract, thereafter, is binding upon neither. *Ramsey v. West*, 676.

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1. INFORMATION BEFORE JUSTICES OF THE PEACE.—The prosecuting attorney of a county may institute prosecutions by information before justices of the peace, for misdemeanors, and is required so to do, whenever he has knowledge of the commission of any such offense, or shall be informed thereof by complaint lodged with him; but he is not required to either set out in the information the sources of his knowledge, or to support it by his affidavit. *State v. Fletchall*, 296.

2. COSTS.—Under section 1768, Revised Statutes, the prosecuting witness is made liable for the costs in the event of an acquittal only in cases of indictment for any trespass against the person or property of another not amounting to felony. *State v. Huiatt*, 302.

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1. REMOTE.—In considering the question of damages to an owner for the occupancy of his land by a railroad track, an estimate of increased danger from fire is too remote, and not proper to be submitted to the jury. *St. Louis, K. C. & C. Ry. Co. v. North*, 345.

2. REMOVAL OF FARM CROSSING.—It is not a legitimate element of damages in a condemnation proceeding, that the railroad company may at some time remove or abolish a farm crossing already established; and an instruction permitting the consideration of such an element is error. *St. Louis, K. C. & C. Ry. Co. v. North*, 345.

3. DANGER FROM FIRE.—A supposed increase of danger from fire is not a proper element of damages to be considered in the owner's favor, in a proceeding under the statute to condemn land for railroad purposes. *St. Louis, K. C. & C. Railroad Co. v. North*, 351.

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DRAWINGS AND PLANS. See EVIDENCE, 14.

EQUITY. See PRACTICE, TRIAL, 12; MORTGAGE, 1, 4.

1. RELIEF WITHHELD.—Before a court of equity will lend its aid, the party seeking it must have gone as far as he may with his legal remedy. After exhausting his legal remedies he could then ask the aid of a court of equity. *Woolfolk v. Kemper*, 421.

2. INJUNCTION IN FAVOR OF EQUITABLE TITLE.—One who has purchased land before the date of a judgment against his vendor, taking only a memorandum of the purchase and acquiring no conveyance until after the rendition of the judgment, may have injunction to restrain an execution sale under the judgment. Such a case is distinguishable from that of a purchaser who holds an unrecorded deed at the time of the judgment, and to whom the relief will be denied. *Parks v. People's Bank*, 12.

3. MULTIPLICITY OF SUITS.—Where the plaintiffs, if compelled to defend their title in an action at law against a purchaser under the execution, would successfully rely on the same facts which they here urge for equitable relief, it is a proper exercise of equity jurisdiction to grant the relief sought, in order to prevent a multiplicity of suits. *Parks v. People's Bank*, 12.

4. VENDEE WITHOUT A DEED—PER THOMPSON, J., DISSENTING:—The holder of a memorandum of purchase at the date of a judgment against his vendor stands in no better position than if he held an unrecorded deed, instead; and, according to the current of Missouri decisions, he would not, in the latter case, be entitled to the relief here sought. *Parks v. People's Bank*, 12.

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ERROR. See PRACTICE, APPELLATE, 3, 8, 12, 17.

ESTOPPEL. See CONTRACT, 2.

EVIDENCE. See WITNESS; AGENT, 1, 2, 3; INSTRUCTIONS, 3, 5, 6; RES JUDICATA, 1; PRACTICE, TRIAL, 5, 7, 9, 10; VERDICT: PRACTICE, APPELLATE, 1; RECORD.

1. ADMISSIONS.—In a controversy about the alleged fraudulent transfer of property, it is not admissible to prove statements made by the vendor to a third person, not in the presence of the vendees, affecting the title of the vendees, after the purposes of the conspiracy, if any, have been accomplished. Nor are such statements by the vendor, when made after the transfer, with possession, admissible on general principles, to affect the title of the transferee. *Meredith v. Wilkinson*, 1.

2. RES INTER ALIOS ACTA.—In an action by a landlord for the defendant's conversion of the tenant's crop upon which the plaintiff had a lien, the record of a judgment previously obtained by the plaintiff against the tenant was properly excluded from evidence, as being *res inter alios acta*. *Griffith v. Gillum*, 33.

3. IRRELEVANT, BUT NOT PREJUDICIAL.—The improper admission of irrelevant evidence for the purpose of sustaining a defence, will not be regarded as prejudicial error, where other and competent evidence for the same purpose is so abundant and so strong that the irrelevant evidence cannot be supposed to have had any controlling influence on the result. *Griffith v. Gillum*, 33.

4. CONSIDERATION.—Where it was claimed that the tenant's sale of his crop to the defendant was made with the landlord's consent, there was no error in the admission of testimony tending to show that the defendant had paid an indebtedness as surety for the tenant, to an amount forming part of the purchase price for the crop. *Griffith v. Gillum*, 33.

5. MATTER NOT IN ISSUE.—Evidence tending to show that the defendant did not derive any benefit from his sale of property in derogation of his indemnifying undertaking, was properly excluded as irrelevant, the ground of action being the plaintiff's loss, and not the defendant's gain. *Bush v. Haeussler*, 47.

6. VALUE OF PROPERTY.—Evidence offered by the defendant to show the value of property held by him for the plaintiff's indemnification at the time when the plaintiff's right of action accrued, was erroneously excluded. *Bush v. Haeussler*, 47.

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EVIDENCE—Continued.

7 IRRELEVANT.—In an action of replevin where the plaintiff claims under a bill of sale from an insolvent debtor firm, evidence offered by the defendants, who were attaching creditors, to show that they had no knowledge of a chattel mortgage executed by the debtors to the plaintiff's beneficiary prior to the bill of sale is irrelevant and properly excluded. *Farrar v. Snyder*, 98.

8. DECLARATIONS OF VENDORS AFTER SALE.—It is not admissible to prove the declarations or admissions of vendors, made after the sale and transfer of possession, to impeach the title of their vendee. *Farrar v. Snyder*, 98.

9. CONSPIRACY.—Where there is no evidence of conspiracy between the plaintiff or his beneficiary and his vendors against the rights of the defendants as creditors of the vendors, it is not competent for the defendants to introduce evidence showing what disposition was made by the vendors of certain moneys in their possession. *Farrar v. Snyder*, 98.

10. PROFESSIONAL SKILL.—In a suit by an attorney for professional services rendered in the taking of depositions, an unofficial transcript of the depositions taken, with the questions put to the witnesses and their answers, made by a witness who was present, is proper, to be used in connection with his testimony as evidence on the questions of reasonable skill and diligence exercised by the attorney and the value of his services. *Stark v. Hill*, 101.

11. MISDESCRIPTION AND IDENTIFICATION.—When a written contract refers by a false description to another instrument bearing a collateral or descriptive relation to some of its terms, parol testimony may be introduced to identify the instrument intended, and to establish the fact of a misdescription in the contract. *Bassett v. Glover*, 150.

12. CREDIT GIVEN ON FALSE REPRESENTATIONS.—In a case where the plaintiff claims a recovery on the ground that he was induced to give credit in a sale of goods by false representations of the purchaser's financial condition, it is necessary for him to prove both that the credit was induced by the representations, and that these were untrue. Hence, if there is evidence tending to show that the plaintiff was induced to give the credit by the reports of two different commercial agencies, it is prejudicial error to submit to the jury one of the reports without the other, since the one withheld may have constituted the controlling inducement with the plaintiff, and its statements may have been true. *Cook v. Harrington*, 199.

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EVIDENCE—Continued.

13. WRITTEN CONTRACT VARIED BY PAROL.—It is error to admit parol testimony to vary the terms of a written contract, when there is no ambiguity in the writing, and the contract is complete in itself. *Clark v. Diffenderfer*, 232.

14. DRAWINGS AND PLANS.—It is not required that a witness who testifies to his measurements of plastering work, shall produce the tracings or drawings by which he made his measurements. *Fitzgerald v. Beers*, 356.

15. PART OF DEPOSITION.—It is error to permit the reading of parts of a deposition, and to refuse to compel the party offering it to read the whole upon demand of the adverse party. *State to use v. Rayburn*, 385.

16. SECONDARY.—Where it is known that a paper once existed, and a diligent but unsuccessful search has been made for it in the place where it was most likely to be found, there is no error in permitting a witness who has had the paper in his possession and is familiar with its contents, to testify as to the subject-matter thereof. *Abel v. Strimple*, 86.

17. TAMPERING WITH WITNESS.—Evidence tending to show that the adverse party has attempted to tamper with a witness is admissible for the purpose of impeaching the testimony given by such adverse party, but for no other purpose. But it is necessary first to lay a foundation for such evidence by asking the party whether he has made such an attempt. The admission of the evidence without this foundation is error. *Bates v. Holladay*, 162.

18. JUDGMENT AND LEVY.—In a suit by a constable for damages on account of false representations, whereby he was induced to release a proper levy, it is competent for the plaintiff to introduce in evidence the judgment under which the levy was made, and to show that it has been satisfied. Being admissible for this purpose, it was properly not excluded under a general objection. *Koontz v. Kaufman*, 397.

19. COMPETENCY AND RELEVANCY.—In the trial of an issue on the forgery of a signature, evidence tending to show the expertness and ability of the person charged, to imitate the genuine signature, is wholly irrelevant and foreign to the issue. *Vaughn v. Wilson*, 489.

20. FRAUDULENT CONVEYANCES.—Although the statute respecting the fraudulent transfer of property by a debtor applies to subsequent as well as existing creditors of the grantor, yet the law is, that it requires stronger evidence of a fraudulent intent on the debtor's part in the case of subsequent creditors, than as to existing creditors. *Zeliff v. Schuster*, 493.

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EVIDENCE—Continued.

21. PROOF OF ALL AVERMENTS NOT ESSENTIAL.—It is a well-recognized rule of practice that every averment, even of material matter need not be proved. If there be sufficient proof of the remaining substantive allegations constitutive of a cause of action. the ends of the law are attained. But if the bill alleges a case of fraud, and the title to relief rests upon the fraud only, the bill will be dismissed if the fraud as alleged, be not proved; but if it rests also upon other matters which are sufficient to give the court jurisdiction and these are proved, relief will be given in respect of so much of the bill as is proved. *Kehoe v. Taylor*, 588.

22. RECEIVED WITHOUT OBJECTION—VARIANCE.—Unless there was a failure of proof of the cause of action, "in its entire scope and meaning," and when the evidence complained of was received without objection, this court will not reverse for such cause. In the case of a variance which may be cured by amendment, defendant's remedy is by affidavit proving to the satisfaction of the court that it was misled, as provided for by the statute. *Brown v. Han. & St. J. Railroad Co.*, 661.

23. PROOF OF CORPORATE EXISTENCE.—The defendant is not required to prove the corporate existence of the plaintiff, when the plaintiff has not put that fact in issue by affidavit, in accordance with the act of 1883. *St. Louis, K. C. & C. Ry. Co. v. North*, 345.

EXECUTION. See MARRIED WOMAN; SUPERSEDEAS.

EXECUTOR. See WILL.

EXEMPLARY DAMAGES. See INSTRUCTIONS, 9.

FALSE REPRESENTATION. See EVIDENCE, 12, 18; ACTION, 4.

FARM CROSSING. See DAMAGES, 2.

FEES.

1. RIGHT OF CIRCUIT CLERK AS AGAINST HIS SUCCESSOR IN OFFICE. A circuit clerk is entitled to receive of the fees earned by him a sum equal to the amount allowed him by law, although such fees may not be collected during his term; and the clerk receiving them (as his successor in office) would hold them in trust for this purpose. The fees earned by a clerk belong primarily to the county; out of them the clerk is allowed by law to retain a certain sum; and he holds such fees as trustee for the purposes for which the law has destined them. *Pugh v. Evans*, 290.

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FEES—Continued.

2. APPLICATION OF TRUST FUND, AS BETWEEN THE CLERK AND COUNTY.—The trust fund would be to supply a deficiency in the receipts of a former year to cover expenses and salaries. There can be no public interest subserved in letting money earned by the clerk, within the limits of his salary, go to the county. *Pugh v. Evans*, 290.

FINDING OF FACTS. See PRACTICE, TRIAL, 21.

FORCIBLE ENTRY AND DETAINER.

DESCRIPTION—JURISDICTION. — A petition in forcible entry and detainer which fails to show that the land claimed is in the county where the suit is brought, or in the state of Missouri, is fatally defective, and the omission cannot be cured by evidence at the trial. The justice had no jurisdiction of the cause, and the circuit court acquired none upon *certiorari*. *McKinney v. Harral*, 41.

FORGERY. See EVIDENCE, 19.

FRAUD. See SALE, 1; EVIDENCE, 12, 20.

WHAT CONSTITUTES.—Fraud, in the contemplation of a court of equity, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another; or by which an undue or unconscientious advantage is taken of another. *Kehoe v. Taylor*, 588.

HUSBAND AND WIFE. See AGENT, 1, 3; MEASURE OF DAMAGES.

INDICTMENT.

NAME OF PROSECUTOR.—An indictment against an officer such as a justice of the peace or constable, for an offense in the administration of justice, need not be indorsed with the name of a prosecutor. *State v. Huiatt*, 302.

INFANT.

APPOINTMENT OF AGENT—VOID AND VOIDABLE ACTS.—An infant's appointment of an agent or attorney, by writing or otherwise, is void, and confers no authority on the appointee to represent the supposed principal. The act of an infant to be voidable only must be done by himself. *Turner v. Bondalier*, 582.

INFORMATION. See CRIMINAL LAW, 1; OFFICIAL OATH.

INSOLVENT DEBTOR. See ADMINISTRATION, 4, 5.

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INSTRUCTIONS. See LANDLORD'S LIEN; PRACTICE, APPELLATE, 6; PRACTICE, TRIAL, 17, 22.

1. OMISSION SUPPLIED.—An instruction may omit an element proper to be considered in the respective rights of the parties, and yet there will be no error if such element be clearly supplied in other instructions given. *Meredith v. Wilkinson*, 1.

2. INTENSITIVE EXPRESSION—USE OF THE WORD "GROSSLY."—There is no error in the use of the word "grossly" in an instruction which declares that the amount of a surety's responsibility must not be "grossly inadequate" to the value of the property transferred for indemnity of the suretyship. *Meredith v. Wilkinson*, 1.

3. COMMENT ON EVIDENCE.—In an action against a street railway company for damages caused by the defendant's negligence in starting the car while the plaintiff was alighting, an instruction to the effect that certain acts of the plaintiff were "all that the law required of her, so far as diligence on her part in getting off the car is concerned," and that under such circumstances the starting of the car was "an act of negligence on the part of the defendant," is erroneous, as being a comment on the evidence. *Blair v. Mound City Ry. Co.*, 224.

4. MEASURE OF DAMAGES.—An instruction that the measure of the plaintiff's damages was the net proceeds, after proper deductions of the defendant's sale of property held by him for the plaintiff's indemnification, with interest, was erroneous. The true measure of damages was the market value of the property at the time when the plaintiff became entitled to have it sold for his benefit. The defendant was not chargeable with interest from the date of his sale, since there was no undertaking for rents or issues of the property. *Bush v Haeussler*, 47.

5. NOT JUSTIFIED BY THE EVIDENCE.—Instructions are properly refused when not justified by the evidence. *Albert v. Seiler*, 247.

6. COUNTER-CLAIM.—A defendant cannot complain of an instruction to the effect that there is no evidence supporting his counter-claim, when in another instruction he is given the benefit of all that is shown in that connection, by a deduction to be made from the plaintiff's claim provided the jury shall find the proofs sufficient therefor. *Deane Steam Pump Co. v. Green*, 269.

7. FINDING NOT LIMITED TO A SINGLE THEORY.—Where two instructions are given, each presenting a different theory upon which recovery may be based, the right to recover is not limited to the theory presented by one instruction, but extends to either or both. *Mills v. City of Carthage*, 141.

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INSTRUCTIONS—Continued.

8. INCONSISTENCY.—There is no inconsistency between instructions, which on the one hand require a user to be shown, and on the other explain the character of the user referred to. Nor is there any valid objection to the words "wilfully" and "knowingly," as used in connection with misdemeanors. *State v. Bradley*, 808.

9. EXEMPLARY DAMAGES.—When a petition is framed strictly on the theory of compensation only, and states no case under the law for a recovery of exemplary damages, it is error to instruct the jury on any hypothesis for an award of exemplary damages. *Welsh v. Stewart*, 376.

10. TRESPASS.—An instruction declaring the law to be "that no person shall enter upon land or tenements in the possession of another except such entry is given by law, and then only in a peaceable manner," states the law correctly and appropriately in an action to recover damages for such an entry, and is not objectionable as a mere abstract proposition when introductory to language which applies the proposition to the hypothesis of fact furnished by the plaintiff's evidence. *Welsh v. Stewart*, 376.

11. LAW QUESTION FOR JURY.—An instruction which submits to the jury a question of law is properly refused. *State to use v. Rayburn*, 385.

12. RIGHTS OF PARTIES.—A party has a right to direct and positive instructions; and the jury are not to be left to believe in distinctions where none exist, or to reconcile positions by mere argument and inference. *Koontz v Kaufman*, 397.

13. MUST BE IN ACCORDANCE WITH THE ISSUES.—It devolves on the defendant to plead contributory negligence in order to raise such issue. The answer not having tendered such issue, and the evidence not being such as to justify the trial court in taking the case from the jury on the ground that plaintiff's evidence showed contributory negligence, it could not devolve on plaintiff in framing his instructions to submit such issue to the jury. *Brown v. Han. & St. J. Railroad Co.*, 661.

14. KNOWLEDGE OF FACTS.—An instruction to the effect that the plaintiff was not bound by any consent given by him to a sale made by the defendant, if such consent was obtained by an incorrect statement of the facts of such sale, or was given without a full knowledge by the plaintiff of all the material facts affecting his interests therein, was erroneously given. The defendant could not be held responsible for any incorrect statements not made by himself, or for the plaintiff's ignorance arising from other causes. *Bush v. Haeussler*, 47.

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INSURANCE. See CONTRACT, 1.

1. WAIVER OF CONDITION.—A contract of insurance included a stipulation that the defendant company should not be liable for any loss or damage that might occur while any premium note remained past due and unpaid. After a loss, which occurred while the premium note remained past due and unpaid, the defendant's agents examined and adjusted the amount of the loss, notified the insured plaintiff thereof and received from him the amount due on the premium note, which was thereupon cancelled and returned to the maker. *Held:* The question whether there was a waiver by the insurer of the stipulated effect of the nonpayment of the premium note should have been submitted to the jury, and the court erred in sustaining a demurrer to the evidence. *McCluer v. Home Ins. Co.*, 62.

2. CONTRACT—PREMIUM NOTE.—Ordinarily the premium note, in the case of a contract of insurance, is deemed a part of the contract between the insurer and the insured, the contract consisting of the policy and the note. Where the insured is mistaken as to the character of the instrument he was signing, and no fraud or deception is alleged or shown, this is not sufficient to relieve him from the obligation imposed by the premium note as a part of the contract of insurance. It was his duty to read it, and in the absence of proof of fraud, deceit, or imposition, the law presumes he has knowledge of its contents. *Palmer v. Continental Ins. Co.*, 467.

3. STIPULATION IN NOTE.—Where there is a stipulation in the premium note making the whole amonnt unpaid on the policy earned, due and payable in case of nonpayment of any instalment when due, except in the event of settlement by the assured "for time expired as per terms on short rates," it is a part of the contract of insurance, and such stipulation is a valid and binding one; and the collection by the insurer of all the unpaid instalments after the loss, which occurred during the default, with knowledge thereof, did not waive the provision of the policy, exempting the insurer from liability for a loss occurring during such default. *Palmer v. Continental Ins. Co.*, 467.

INTENTION. See ORPHAN CHILD; MERGER.

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JUDGMENT. See APPEAL, 2; EVIDENCE, 2, 18.

NUNC PRO TUNC.—To justify a court in directing the entry of a judgment *nunc pro tunc*, it is essential for the records of the court to show two things: (1) That the court has rendered a judgment; (2) that the judgment rendered was the judgment, the entry of which is asked to be directed. It is not necessary that the records of the court show in express terms that such judgment has been rendered; it is sufficient if the facts shown by the records are such as to reasonably carry conviction that the judgment was in fact rendered. *Witten v Robison*, 525.

JURISDICTION. See FORCIBLE ENTRY AND DETAINER; VENUE, 2.

1. APPELLATE—REVENUE LAWS.—A suit by the tax collector against an administrator for taxes assessed against his intestate's estate, in which questions arise as to the nature of the remedy that may be sought, is a "case involving the construction of the revenue laws of this state," and is not within the appellate jurisdiction of this court. Hence, the cause must be transferred to the Supreme Court. *State ex rel. v. Tittmann*, 82.

2. CONSTITUTIONAL INTERPRETATION—PER ROMBAUER, P. J., DISSENTING:—The constitutional phrase "involving the construction of the revenue laws of this state" is not equivalent in meaning with "questions affecting the revenue." It does not appear that the questions arising in this cause are not covered by the latter expression. There should be no transfer to the Supreme Court without a clearer warrant therefor than appears in such a case. *State ex rel. v. Tittmann*, 82.

3. AMENDMENT.—The court from which a cause has been removed to another by change of venue, has no jurisdiction to permit the sheriff to amend his return on the original process: and an order so made is void, and not admissible in evidence. The court having possession and jurisdiction of the cause for the time being is the only one that can authorize such an amendment. *State to use v. Rayburn*, 385.

4. OBSTRUCTING PUBLIC ROAD.—Under section 6964, Revised Statutes, providing for the enforcement of the penalty against the offense of obstructing a public road, and under the terms of sections 1760 and 1761, Revised Statutes, conferring jurisdiction in cases of misdemeanor, the remedy provided by the statute is concurrent. The remedy provided in a justice's court is not exclusive, so as to take away jurisdiction from the circuit courts, and the statute provisions are in conformity with the constitution of this state. *State v. Bradley*, 308.

JURY. See PRACTICE, TRIAL, 10.

JUSTICES' COURTS. See APPEAL, 1.

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KANSAS CITY.

1. CHARTER, AS TO NUISANCES.—The City of Kansas not only has the power to abate nuisances, but by its charter has the extraordinary power to define and declare what is a nuisance, which is broader than the general authority to abate. But neither will justify a wanton declaration that an act or avocation is a nuisance which unquestionably is not; or an unwarrantable invasion of private rights. *City of Kansas v. McAleer*, 433.

2. ACTION BY POLICEMAN FOR SERVICES.—A policeman cannot, without first obtaining from the board of police commissioners a warrant therefor on the city treasury, maintain an action against Kansas City for his services. His remedy in such a case is by *mandamus* to the board of police commissioners to compel the issuance of the proper warrant. *Riley v. City of Kansas*, 439.

3. POLICE COMMISSIONERS—COMPENSATION OF POLICE OFFICERS. Under the act of the legislature creating the board of police commissioners for Kansas City, the board, and not the city council, is invested with the power and duty of fixing and regulating the compensation of police officers. *Riley v. City of Kansas*, 439.

4. CHARTER—CONSTRUCTION.—The *proviso* in section four, of article eight, of the charter of Kansas City, to the effect "that nothing in this section shall be so construed as to prevent any defendant from pleading in reduction of the bill any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner," is a beneficial provision, for the protection of the taxpayer, who may or may not interpose such defence. But he may plead the general issue, or its equivalent, and in such event the case would stand on the contract, and not on a *quantum meruit*. *Traders' Bank v. Payne*, 512.

KNOWLEDGE. See INSTRUCTIONS, 14; EVIDENCE, 7; SALE, 1; ACTION, 4.

IMMATERIAL.—The fact that the owner did not know, at the time of making the sale, that the latter had been procured by the broker, is immaterial. The right to a recovery of compensation by the broker depended upon the fact that he had procured a purchaser, and not upon the knowledge, on the part of the owner, of that fact at the time of the sale. *Millan & Abbott v. Porter*, 563.

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LANDLORD'S LIEN.

WAIVER.—An instruction to the effect that the defendant was liable to the plaintiff if he bought the crop of plaintiff's tenant, knowing of the plaintiff's lien thereon, was properly refused, under the evidence, without the qualification, *unless* it appeared that the plaintiff had previously waived his lien and given his permission for the sale. Nor was there any error in giving an instruction to the effect that, if the plaintiff, prior to the sale of the crop, gave his tenant permission to sell the same, and intended thereby to waive his lien and look to the tenant for payment of the rent, then the verdict should be for the defendant. *Griffith v. Gillum*, 83.

LANDLORD AND TENANT.

1. MISREPRESENTATIONS BY LANDLORD.—An assignee of a lease who has covenanted to perform all its terms and stipulations cannot defend against a suit by the lessor for breaches of his covenants, on the ground that the lessor falsely represented to him that the lease was renewed to the defendant's assignors, in consequence of which misrepresentation the defendant has sustained a pecuniary loss, when in fact a copy of the lease was in the defendant's possession and he had all the means of knowledge that the lessor had concerning the fact of renewal; when the defendant and his assignors have held the premises for the full term of renewal, as contemplated, and all the parties concerned have acted throughout upon an understanding of the fact of renewal and complied with all its terms, until the defendant's breaches complained of. *Clemens v. Knox*, 185.

2. RENEWAL OF LEASE.—A tenant defendant cannot maintain that his lease has never been renewed, on the ground that no writing evidences a renewal on agreed terms, as contemplated in the original lease, when in fact, some time after the expiration of the original term, the defendant took an assignment of the lease from the former tenants, agreeing in writing to abide by and perform all the terms and conditions therein set forth, and the lessor at the same time gave his consent in writing to the assignment, upon the stipulated conditions. *Clemens v. Knox*, 185.

LEASE. See LANDLORD AND TENANT, 1, 2.

LEGACY.

SATISFACTION OF DEBT.—In the case of a legacy to a creditor, the rule is that when the legacy is the same in amount as the debt, still the legacy shall not, in the absence of proof that the intention of the testator was that it should, be deemed satisfaction of the debt; if the legacy is to be paid on terms less advantageous to the creditor than the terms on which the debt is payable. *Stone v. Rennock*, 544.

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LESSEE. See TAXES.

LICENSE. See DRAMSHOPS.

LIMITATION. See STATUTE OF LIMITATIONS.

PLEADING—CONTINUANDO.—Where the evidence clearly shows that the obstruction of a public road was continued by the defendant, and existed on the day alleged in the information,—a day within the year next preceding the filing of the information—this was sufficient to sustain the prosecution. It was not necessary, in such case, that the information should have contained a *continuando* as in case of a prosecution for levying a nuisance. *State v. Bradley*, 308.

LOST PAPER. See EVIDENCE, 16.

MANDAMUS. See POLICE OFFICER.

MARRIED WOMAN.

PERSONAL PROPERTY—SUBJECTED TO DEBT FOR NECESSARIES.—In order to subject the wife's separate property, under the statute, to execution for the payment of her husband's debt, created for necessaries for her or her family, it is necessary to make her a party defendant to the suit. And where the judgment is against the husband alone, as in this case, the execution issued upon it was no authority for the sheriff's action in levying upon the separate property of the wife. *Bedsworth v. Bowman*, 116.

MEASURE OF DAMAGES. See INSTRUCTIONS, 4, 9.

LOSS OF WIFE'S SOCIETY.—There is no exact standard by which to measure the value of a wife's society. The amount to be recovered must be left to the enlightened judgment of the jury, who must, under the evidence before them, fix upon a reasonable sum. *Brown v. Han. & St. J. Railroad Co.*, 661.

MECHANIC'S LIEN.

1. EXTRA WORK.—Where a subcontractor's contract requires that all extra work shall be first agreed upon in writing by the superintendent and the principal contractor, the subcontractor will be entitled to compensation nevertheless for extra work made necessary by a change of plans and dimensions without his knowledge until after the work was done, and when the principal contractor has absconded and the superintendent refuses to give any writing. *Fitzgerald v. Beers*, 356.

2. LUMPING CHARGE.—An account filed for a mechanic's lien is not open to the objection that it makes a lumping charge, when it itemizes the charges according to the kinds of brick in the work and the number of each kind used. *McLaughlin v. Schawacker*, 365.

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MECHANIC'S LIEN—Continued.

3. ACCOUNT.—A mechanic's lien account which contains a debit and a credit for the same item does not, therefore, fail of being a just and true account, when the evidence shows that the item does not involve either a final debit or credit, and might, without affecting the rights of either party, have been left out of the account altogether. *McLaughlin v. Schawacker*, 365.

4. VERDICT.—It is no objection to a verdict declaring a lien, that improper items which are omitted from it are included in the personal findings against defendants who are not affected by the lien, and who have not appealed. *McLaughlin v. Schawacker*, 365.

5. OBJECTIONABLE ITEMS.—A lien account is not vitiated by the fact that it contains items which are not included in the contract, when such items would be lienable if covered by the contract, and are severable from those within the contract. *McLaughlin v. Schawacker*, 365.

6. REQUEST OF OWNER.—It is not necessary in a suit by a subcontractor to aver in the petition that the materials were furnished or the labor performed upon request of the owner of the property. *McLaughlin v. Schawacker*. 365.

MERGER.

INTENT OF PARTIES.—In estates acquired by act of the parties, they merge or not and mortgages are extinguished or not, according to the intent of the parties, as collected from the deed or the circumstances of the transaction; and when these furnish no evidence of the intent, from the interest of the parties. The absence of such intention affirmatively appears from the act of the plaintiff in taking a formal assignment of the debt and mortgages. *Christy v. Scott*, 331.

MISCONDUCT. See PRACTICE, APPELLATE, 10, 11

REMARKS OF COUNSEL.—Objectionable remarks of counsel to the jury will not be considered on appeal, when not brought to the attention of the trial court at the proper time. *Muirhead v. Han. & St. J. Railroad Co.*, 578.

MISTAKE. See MORTGAGE, 2; INSURANCE, 2.

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MORTGAGE. See MERGER; PRACTICE, TRIAL, 6, 7, 13; TRUST DEED; ACTION, 5.

1. ASSIGNEE OF DEBT SECURED MAY MAINTAIN REPLEVIN.—The assignee of a debt secured by mortgage can maintain replevin for the possession of the property. Nor could it affect the right of the assignee that he afterwards sold the property to the mortgageor and took a new mortgage. As against a party who has acquired no intermediate right upon the faith of the satisfaction of the first mortgage, courts of equity will restore the first mortgage, even after an entry of satisfaction, for the protection of the assignee. *Christy v. Scott*, 331.

2. SATISFACTION BY MISTAKE.—It is competent for the first mortgagee or his assignee to show by parol that his acknowledgment of satisfaction was made through mistake. Mistake in such connection is nothing more than "that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." *Christy v. Scott*, 331.

3. RIGHTS OF PARTIES.—After condition broken, the mortgagee becomes entitled to the possession of the mortgaged property. Until foreclosure, pursuant to the provisions of the mortgage, the mortgageor has an equity of redemption. But if the mortgagee shall proceed to a foreclosure, he does so for the purpose of realizing his debt, and when he has done this, it is the accomplishing of the main purpose and office of the mortgage. And where the mortgage covers several parcels of property, each parcel should be sold separately, and the moment he has realized enough to pay the debt and charges he should stop the sale. He then becomes a trustee of the remaining property for the benefit of the mortgageor, and his refusal to surrender it is tortious, and is subject to action of replevin or trover, according to the fact. *Moore v. Ryan*, 474.

4. FORECLOSURE—PURCHASE BY MORTGAGEE.—Where the mortgagee purchased at his own sale, it left the right of the mortgageor to redeem, unforeclosed. Such a sale, though not void, is voidable, at the election of the mortgageor, by paying off the mortgage debt. But if, after having knowledge of such sale and purchase by the mortgagee, the mortgageor acquiesced therein, he could not call on a court of equity to aid him in setting aside such sale. *Moore v. Ryan*, 474.

MOTION FOR ELECTION. See PRACTICE, TRIAL, 15.

MOTION FOR NEW TRIAL. See PRACTICE, APPELLATE, 4, 5, 8, 17.

MUNICIPAL CORPORATION. See DRAMSHOPS; KANSAS CITY, 1, 2.

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MUNICIPAL ORDINANCE.

1. TELEPHONE POLES.—A municipal ordinance which peremptorily directs a change in the location of telephone poles, as previously permitted and occupied, cannot be upheld when it is neither averred nor shown that the existing location incommodes the public, or that any good reason exists for the removal. *City of Hannibal v. M. & K. Telephone Co.*, 23.

2. DEPENDENT PROVISIONS.—If two parts of an ordinance are practically dependent upon each other, and one of them is void, the other cannot be sustained or enforced. *City of Hannibal v. M. & K. Telephone Co.*, 23.

3. UNREASONABLE AND OPPRESSIVE.—Although municipal corporations are *prima facie* the sole judges of the necessity of their ordinances, yet, if one is altogether unreasonable and oppressive, it may be vacated by the courts for that reason alone. Such an ordinance is one which discriminates between a particular corporation and others using similar poles, in requiring a change of location which will interrupt its business without apparent good reason, and a total removal of all standing poles as a condition precedent to the right of re-location, and which fails to provide for any practicable re-location. *City of Hannibal v. M. & K. Telephone Co.*, 23.

4. CLASS LEGISLATION.—A municipal ordinance which demands that an individual corporation shall do a certain thing, and then provides a penalty against any person, company, or corporation which shall fail to do that thing, it being impossible for any other to do it, is obnoxious to the constitutional inhibition of class legislation, and, therefore, void. *City of Hannibal v. M. & K. Telephone Co.*, 23.

NEGLIGENCE.

DEFECTIVE MACHINERY.—Where there was no evidence tending to show that the machinery by which the plaintiff's son lost his life was of defective construction, or that it was improperly adjusted, or insufficiently oiled, or that the defendant's officers or agents knew of any latent defects therein, and where it affirmatively appeared that the deceased voluntarily assumed a dangerous and unnecessary position in handling the machinery, and that if he had exercised the most ordinary care he would have handled it in a different manner and would not have been hurt, it results, as a matter of law, that the plaintiff showed no right of recovery, and that this court should reverse the judgment in her favor, without remanding the cause. *Sparks v. Kansas City, S. & M. Railroad Co.*, 111.

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NOTICE. See PRACTICE, TRIAL, 14.

NUISANCE. See KANSAS CITY, 1,

NUNC PRO TUNC. See JUDGMENT.

OFFENSIVE TRADES. See PROPERTY RIGHTS.

OFFICIAL OATH.

"UNDER OATH OF OFFICE."—The requirement of the statute authorizing the prosecuting attorney to make such informations "under his oath of office" was superfluous, as such officer, while acting in his official capacity, in all prosecutions, is supposed by the law to be acting under his oath of office. *State v. Fletchall*, 296.

OPENING AND CLOSING. See PRACTICE, TRIAL, 1, 13; CONDEMNATION.

OPINION. See CONTRACT, 3.

ORPHAN CHILD—COMPENSATION FOR MAINTENANCE.—One who has reared and maintained an orphan child cannot claim compensation for so doing if, at the time of his benefactions, he did not intend or expect to be paid for them. But he has the right to change his intention in this regard at any time, and if it appear that, at a certain point of time, he did so change it that thereafter he intended and expected to be compensated out of the child's estate, then he will be entitled to recover for reasonable and necessary expenditures in the child's behalf after such change of intention. And in a suit upon an account covering the whole period of care and maintenance, it is error for the court to deny him any right of recovery whatever, by sustaining a demurrer to the evidence. *Lippman v. Tittmann*, 69.

PARTIES. See PRACTICE, TRIAL, 6, 11; RES JUDICATA, 2.

PARTNERSHIP.

SALE OF INTEREST BY PARTNER.—Although the sale of his interest in a partnership by an individual member, dissolves the partnership, the purchaser acquires only the seller's interest in the residue after all the partnership debts and liabilities shall be discharged; and the partnership property is as completely as ever subject to the rights of the partnership creditors. *Tennent v. Guenther*, 429.

PERSONAL PROPERTY.

EXECUTION FOR PURCHASE PRICE.—When personal property is subject to execution for purchase price under the provisions of section 2353, Revised Statutes, there is no direct lien created by the statute, though it may be considered, in some cases, as in the nature of a lien. The only mode provided by the statute for subjecting the property for the purchase price is to obtain a judgment therefor—though there might be relief in equity in a proper case. *Woolfolk v. Kemper*, 421.

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PETITION. See PRACTICE, APPELLATE, 7.

PLEADING. See PRACTICE, TRIAL, 2, 7, 11, 15, 18, 20; LIMITATION; PRACTICE, APPELLATE, 7; KANSAS CITY, 4; MECHANIC'S LIEN, 6; INSTRUCTIONS, 9, 13.

QUANTUM MERUIT.—When a petition states a cause of action on contract only, there can be no recovery upon a *quantum meruit. Traders' Bank v. Payne*, 512.

POLICE COMMISSIONERS. See KANSAS CITY, 3.

POLICE OFFICER. See KANSAS CITY, 2, 3.

REMEDY OF DISMISSED POLICEMAN.—If the board of police commissioners wrongfully dismissed the plaintiff from his office of policeman, without cause and trial, he had a clear remedy by *mandamus* to compel his reinstatement. *Riley v. City of Kansas*, 439.

PRACTICE, APPELLATE. See PROMISSORY NOTE, 2; PRACTICE, TRIAL, 9, 16, 17; EVIDENCE, 3, 22.

1. INADMISSIBLE EVIDENCE.—A judgment will not be reversed because of the admission of evidence inadmissible by law, when such incompetent evidence is confirmed by all the other testimony, and its exclusion could not have had a tendency to produce a different result. *Abel v. Strimple*, 86.

2. JUDGMENT FOR RIGHT PARTY—PER ROMBAUER, P. J., CONCURRING IN RESULT:—When, upon a view of the whole record, it is clearly manifest that the judgment is for the right party, it will not be reversed, although errors may have intervened. *Bassett v. Glover*, 150.

3. RULES OF COURT ESSENTIAL—ASSIGNMENTS OF ERROR.—The rules of this court are essential to the orderly and prompt disposition of all causes in court. He who assigns error must make that error apparent; he who wishes to reverse anything done by the court below must show it to be wrong. *Guinn v. Boas*, 131.

4. MOTION FOR NEW TRIAL.—A bill of exceptions which recites merely that "thereupon, after verdict, the defendants filed the following motion for a new trial," does not show that the motion was filed within four days after the trial, and the judgment must, therefore, be affirmed. It is not sufficient that the date of the filing appears in the clerk's minutes. It must appear in the bill of exceptions. *State to use v. 'Mason*, 211.

5. MOTION FOR NEW TRIAL.—Objections to the exclusion of evidence will not be considered on appeal, when they were not presented below in the motion for a new trial. *Albert v. Seiler*, 247.

6. INSTRUCTIONS.—An objection that the verdict was against the instructions for the plaintiff is entitled to no consideration when the record fails to show that any instructions were given for the plaintiff. *Albert v. Seiler*, 247.

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PRACTICE, APPELLATE—Continued.

7. PLEADING—DEMURRER.—If the petition fails to state a cause of action, although not for the reasons urged in the demurrer, the judgment sustaining the demurrer must be affirmed. *Pugh v. Evans*, 290.

8. MOTION FOR NEW TRIAL.—Where the error assigned is the action of the trial court in denying an application for a continuance, it will not be considered when the error assigned was not set up in the motion for a new trial. *State v. Fletchall*, 296.

9. FILING OF TRANSCRIPT IN APPELLATE COURT.—The law is well settled that it is the duty of the party appealing to see that the transcript of the record is made out, and filed in this court, and he has no right to rely on the circuit clerk to perform this duty of his own motion. *McCaffery v. Memphis & C. Railroad Co.*, 340.

10. MISCONDUCT—TALKING TO JURY.—Remarks improperly made to a jury about the merits of a case pending before them will furnish no ground for a reversal, when the irregularity was not properly objected to at the time of its occurrence. *St. Louis, K. C. & C. Railroad Co. v. North*, 351.

11. IMPROPER REMARK BY COURT.—An objection that the court made an improper remark to the jury is not available on appeal, when it was not presented below in the motion for a new trial. *McLaughlin v. Schawacker*, 365.

12. ASSIGNMENT OF ERRORS.—The statute directs the appellant or plaintiff in error to file in the cause a specific assignment of errors "on or before the first day on which causes from the same circuit are set for hearing." The other party shall then join in such error within four days. The statute directs the court to examine the record as presented, on the assignments, and to affirm or reverse, as the fact and law may be. The inquiry is not limited to the points taken in the briefs of counsel. *Koontz v. Kaufman*, 397.

13. ABSTRACT OF RECORD.—Under rule fifteen of the Kansas City Court of Appeals, the abstract of the record should set forth so much of the record as is necessary to a full understanding of the questions presented to the court for determination. The abstract is intended to take the place of the record, and must be, not a statement of what the record is, but an abridgment of the record. *In re Redding Bros.*, 425.

14. DUTY OF APPELLANT AS TO TRANSCRIPT.—It is the duty of the appellant to see that his transcript is made out and filed in the appellate court pursuant to the requirements of law; and he cannot excuse himself by depending upon the clerk to perform this duty. *Barnes v Winn*, 483.

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PRACTICE, APPELLATE—Continued.

15. PROCEEDINGS FOR AFFIRMANCE.—The act of 1883 relating to the affirmance of judgments in appellate courts, is applicable to the Kansas City Court of Appeals. This statute was not repealed by the act of 1885, and the courts are not remitted back to the operation of the old rule under section 3717, Revised Statutes. It was not the design of the act of 1885 to repeal the act of 1883, but only to place this court on the same basis in this particular as the Supreme Court and the St. Louis Court of Appeals, and this had already been accomplished by operation of law. *Barnes v. Winn*, 483.

16. VERDICT OF JURY.—The verdict of the jury is binding upon this court as to all facts necessarily found by the jury in order to reach the verdict and to prove which there was sufficient evidence. *Millan & Abbott v. Porter*, 563.

17. ERROR NOT ASSIGNED IN MOTION FOR NEW TRIAL.—Where error assigned here, was not assigned in the motion for new trial, this court cannot consider it. *Jones v. Missouri Pac. Ry. Co.*, 614.

18. EXCESSIVE VERDICT.—This court cannot say that the damages were so excessive as to justify its interference with the proper discretion of the jury and the trial court, when the verdict bears no evidence of prejudice or passion to invoke such interference. *Jones v. Missouri Pac. Ry. Co.*, 614.

PRACTICE, TRIAL. See INSURANCE, 1; INSTRUCTIONS, 1, 3, 11; DEPOSITION; ATTACHMENT; VENUE, 1; EVIDENCE, 5, 11, 14, 15, 22; CONDEMNATION; JUDGMENT; VERDICT; MISCONDUCT.

1. OPENING AND CLOSING.—The right to open and close the argument may be awarded in the sound discretion of the court, and error is not assignable thereof, except in cases of manifest abuse or prejudice. *Meredith v. Wilkinson*, 1.

2. INSUFFICIENT AVERMENTS.—There can be no recovery under Revised Statutes, section 2122, of damages for the death of the plaintiff's minor son, when it is neither averred nor proved that the deceased left no widow or surviving children. The objection is not waived by pleading over, and may be presented by demurrer to the evidence, or by a motion in arrest. *Sparks v. Kansas City, S. & M. Railroad Co.*, 111.

3. VERDICT DIRECTED BY THE COURT.—Where the ultimate or constitutive facts are undisputed, and a proper verdict will be merely the conclusion of the law upon such facts, there is no error in a direction to the jury that their verdict shall be in favor of the party for whom the judgment of the law so declares. *Clemens v. Knox*, 185.

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PRACTICE, TRIAL—Continued.

4. READING PART OF DEPOSITION.—Where an exhibit attached to a deposition contains two commercial agency reports, both of which are referred to by the deponents, it is error for the court to permit the party offering the deposition to read to the jury one of the reports only, against the objection of the adverse party. *Cook v. Harrington*, 199.

5. DEMURRER TO EVIDENCE.—Where the plaintiff sued for work done in second-class masonry, and the engineer, by whom, under the terms of the contract, the measurements and classifications were to be determined, testified that the plaintiff did no second-class masonry, the court ought to have sustained a demurrer to the evidence. *Clark v. Diffenderfer*, 232.

6. SURVIVAL OF ACTION.—An action under Revised Statutes, sections 3311, 3312, for failure by a trustee, mortgagee, or beneficiary to acknowledge satisfaction in the manner required, after demand made therefor upon payment of the debt, survives, after the death of such trustee, mortgagee, or beneficiary, against his legal representatives. *Wiener v. Peacock*, 238.

7. SPECIAL DEFENCES.—Matters of excuse or justification for a failure to acknowledge satisfaction of a trust deed or mortgage, when required by the statute, must be specially pleaded, and cannot be proved under a general denial. *Wiener v. Peacock*, 238.

8. MOTION FOR NEW TRIAL—SURPRISE.—A motion for a new trial on the ground of surprise is properly denied when it appears that the new testimony proposed to meet the alleged surprise is merely cumulative. Nor can a party avail himself of an alleged surprise at the trial when he did not, at the time of its occurrence, make the fact known and take such steps as were possible to counteract its effects. *Albert v. Seiler*, 247.

9. CONFLICTING EVIDENCE.—Where the evidence is conflicting and there is substantial testimony in support of the verdict, the trial court commits no error in refusing a new trial. *Albert v. Seiler*, 247.

10. PROVINCE OF JURY—WHEN COURT MAY INTERFERE.—Whenever a jury may, without doing violence to the dictates of reason and common sense, infer a given fact on account of its known relation to the fact proved, the court should not interpose its own different conclusion. But the due protection of property rights demands that the court should draw the line between tangible evidence with reasonable, legitimate deductions, and mere conjecture or speculation. *Peck v. Missouri Pac. Ry. Co.*, 123.

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PRACTICE, TRIAL—Continued.

11. UNNECESSARY PARTY.—The objection that there is an unnecessary party plaintiff will be deemed to be waived, when the fact neither appears on the face of the petition, nor is alleged in the answer. *Mills v. City of Carthage*, 141.

12. EQUITABLE RULES.—Equitable rules, as to procedure, are applied in writs of entry, when the property mortgaged is realty, and when such writs are employed to enforce a mortgage security instead of a bill in equity. The same rules should be applied in cases of mortgages of personalty. *Christy v. Scott*, 331.

13. CONDEMNATION PROCEEDINGS—OPENING AND CLOSING.—In a trial before a jury, in a proceeding under the statute for the condemnation of land for railroad purposes, there is no error in permitting the defendant land-owner to assume the burden of proof and to open and close the case. *St. Louis, K. C. & C. Ry. Co. v. North*, 345; *Same v. Same*, 351.

14. AMENDED PETITION—NOTICE.—Parties already in court by sufficient service are not entitled to special notice or service of an amended petition. *McLaughlin v. Schawacker*, 365.

15. DIFFERENT CAUSES OF ACTION IN THE SAME COUNT.—When two causes of action are blended in a single count of the petition, the defendant must object either by a motion to compel the plaintiff to elect between them, or by a demurrer, and cannot take advantage of the irregularity after verdict by a motion in arrest. *Welsh v. Stewart*, 376.

16. FAILURE TO OBJECT IN TRIAL COURT.—The party who lets in evidence which is not competent in the trial court without objection, and having himself brought it before the jury and predicated an instruction upon it, cannot first complain of it on appeal. *Zeliff v. Schuster*, 498.

17. TRIAL BY COURT—INSTRUCTIONS.—Where a case is tried by the court without the intervention of a jury, this court will consider the declarations of law given and refused only for the purpose of determining the theory on which the court tried the case. And every presumption must be made by this court in favor of the action of the trial court. *Stone v. Rennock*, 544.

18. PLEADING—WAIVER.—Under the practice act, all objections to the petition, excepting only the jurisdiction of the court over the subject-matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action, are deemed waived unless they be made by demurrer or answer. All objections to mere formal defects are waived by pleading to the merits, and are cured by verdict. The requirement that the petition specify the term of the court is one of form merely. *Ryors v. Pryor*, 555.

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PRACTICE, TRIAL—Continued.

19. VERDICT—SUFFICIENCY.—Under sections 3629 and 3654, Revised Statutes, when the issue is for the recovery of money only, the verdict, if for the plaintiff, should also assess the amount of the recovery. But *held* that the verdict, though informal, was sufficient, being, "We, the jurors, find for the plaintiff one thousand dollars." *Ryors v. Pryor*, 555.

20. EFFECT OF GENERAL DENIAL.—Under a general denial, the defendant may substantially maintain a special defence, in disproving the contract asserted against him, by proving that the contract was materially different from the one so asserted. There can be no just complaint if the failure of a special defence be due, not to the rejection of evidence, but to its insufficiency. *Clemens v. Knox*, 185.

21. FINDING OF FACTS.—It is not necessary to the validity of a decree, in chancery that there should be any special finding of facts by the court. If this court, on review, should find the essential facts to exist, it would not be bound by the findings of the trial court, but if the facts found by the trial court be sufficient to warrant the decree under the pleadings, the judgment should stand. *Kehoe v. Taylor*, 588.

22. INSTRUCTIONS.—When there was no evidence in the case, on which to predicate the issue of contributory negligence, it is not error to ignore such issue in the instructions. *Jones v. Missouri Pac. Ry. Co.*, 614.

23. PLEADING—CONTRIBUTORY NEGLIGENCE.—Contributory negligence is a matter of defence and must be pleaded; yet if such negligence is not pleaded and the plaintiff's own evidence discloses a clear case of contributory negligence, he must fail in his action. *Brown v. Hannibal & St. J. Railroad Co.*, 601.

PRINCIPAL AND AGENT. See TRESPASS.

PROCEEDING IN REM. See RES JUDICATA, 1.

PROFESSIONAL SKILL. See EVIDENCE, 10.

PROHIBITION. See SUPERSEDEAS.

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PROMISSORY NOTE. See ACTION, 2; DRAMSHOPS.

1. RENEWAL—CONTINUING SECURITY—INSTRUCTION.—A promissory note given in renewal of another note which is secured by deed of trust, is secured in like manner by the deed, until the debt becomes satisfied. Hence where a second note is given upon the maturity of the first, for a like amount, and the payee is afterwards found to be in possession of both notes, it is not material how the mere fact of his possession came about; and it is error to instruct that, unless it appear from the evidence that the first note was retained by the payee with the knowledge and consent of the debtor, the trust debt must be considered as discharged, and the creditor will be liable for failure to acknowledge satisfaction, as required by the statute. *Wiener v. Peacock*, 238.

2. TITLE OF PLAINTIFF.—In a suit on a promissory note, where it is denied that the signature of the plaintiff's endorser is genuine, and evidence is improperly admitted on that issue, it will not follow that a judgment for the plaintiff must be reversed. It was not material to the plaintiff's title that the signature was genuine. It appearing clearly from all the evidence that the plaintiff advanced the money and bought the note from the payee, to hold it for the accommodation of the makers, the judgment was manifestly for the right party, and it should be affirmed. *Blesse v. Blackburn*, 264.

PROPERTY RIGHTS.

SUBJECT TO RESTRICTIONS.—Every right, from an absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. As a city extends, offensive trades must be removed to vacant grounds beyond the immediate neighborhood of the residences of citizens. *City of Kansas v. McAleer*, 433.

PROSECUTOR. See INDICTMENT.

PUBLIC POLICY. See CONTRACT, 5.

PUBLIC ROAD. See JURISDICTION, 4.

WHEN CONSTITUTED BY USER.—A road may become a public highway by user, for the obstruction of which a prosecution will lie. It is no longer an open question in this state that the continued use of a road by the public for a period of ten years, will constitute it a public road, for the obstruction of which the offender may be proceeded against criminally. *State v. Bradley*, 308.

PURCHASE PRICE. See PERSONAL PROPERTY.

QUANTUM MERUIT. See KANSAS CITY, 4; PLEADING.

RAILROADS. See DAMAGES, 1, 2, 3.

RECOGNIZANCE. See APPEAL, 1, 2.

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RECORD. See JUDGMENT.

TRANSCRIPT ON CHANGE OF VENUE.—A transcript filed in a court to which the cause has been removed by change of venue becomes a record of that court, and a duly certified transcript thereof is competent as evidence, not liable to the objection that it is a copy of a copy. *State to use v. Rayburn*, 385.

REPLEVIN. See MORTGAGE, 1, 3.

1. DEFENCE AVAILABLE.—The defendant in replevin must defend upon the specific ground taken by him when demand for possession was made and the trial had. *Moore v. Ryan*, 474.

2. AFFIDAVIT—AMENDMENT.—An affidavit in replevin, which the law requires to be filed before the issuing of process by a justice of the peace, cannot be supplied by amendment in the circuit court, on appeal. *Turner v. Bondalier*, 582.

RES JUDICATA.

1. REMOVAL OF EXECUTOR.—An application for the removal of an executor, under Revised Statutes, section forty-three, is a proceeding *in rem*, and the matters therein determined, including the existence of a sufficient cause for the executor's removal, are *res judicata* as to all the world, so as to bar inquiry into them in a subsequent proceeding instituted for the same purpose, even by a different complainant. But where the acts of the executor, done since the institution of the first proceeding, are so intimately blended with those that were done before it, that proof of the former acts is necessary in order to develop the meaning and effect of the subsequent acts, such former acts may be proved as tending to show causes for removal which have transpired and occurred after the institution of the former proceeding. And in order to effect this, it may be necessary and proper to introduce evidence of the whole course of the executor's administration of the affairs of the estate. *Meriwether v. Block*, 170.

2. PARTIES.—It is a fundamental rule of the doctrine of *res judicata*, that judgments *in personam* conclude only parties to the record and their privies. But among parties are those who have assumed such relation to the litigation as to be treated as parties. No one is a privy to a judgment whose succession to the rights of property thereby affected occurred previous to the institution of the suit. *Koontz v. Kauffman*, 397.

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SALE. See INSTRUCTIONS, 14; PARTNERSHIP; MORTGAGE, 3, 4; CONTRACT, 6, 7, 8.

1. DEFRAUDING CREDITORS—INNOCENT PURCHASER.—A sold a stock of goods to B with the intent of hindering, delaying or defrauding A's creditors, and B sold and delivered the goods to C, who had no knowledge of or participation in the fraud, and thereupon C gave his check for the purchase money to B, who deposited it in the bank, taking a certificate or ticket of deposit as for so much cash. *Held:* The transactions vested a complete title to the goods in C, against which an attachment and levy in behalf of A's creditors could not prevail. *Pribe v. Glenn*, 215.

2. PARTNERSHIP INTEREST.—The mere fact of a sale of his interest in a partnership, by an individual member, is not fraudulent, nor is it any evidence of fraud. *Tennent v. Guenther*, 429.

SATISFACTION. See PROMISSORY NOTE, 1; MORTGAGE, 1, 2; EVIDENCE, 18; LEGACY.

SECURITY. See TRUST DEED.

SEPARATE PROPERTY. See MARRIED WOMAN.

SETTLEMENT. See ACTION, 3

SHERIFF. See MARRIED WOMAN.

STATEMENTS. See INSTRUCTIONS, 14; EVIDENCE, 1, 8.

STATUTE OF FRAUDS.

1. SUFFICIENCY OF MEMORANDUM.—Where the answer admits that the lands levied on are the lands described in the petition, and were inherited by the vendor from his father, it cannot be objected that the memorandum offered in evidence, which describes the lands as having been left to the vendor by his father, is insufficient under the statute of frauds. The description substantially identifies the property. *Parks v. People's Bank*, 12.

2. PROMISE TO PAY THE DEBT OF ANOTHER.—A promise, without consideration, to pay the debt of another, when it does not appear that the promisor is in any wise indebted on his own account to the promisee, must be in writing, or else will be void under the statute of frauds. *Moore v. Kansas City, S. & M. Railroad Co.*, 145.

STATUTE OF LIMITATIONS.

APPROPRIATION OF PAYMENT.—When a creditor holds two demands against his debtor, one of which is barred by the statute of limitations, and the other not, and the debtor makes a payment in part, without indicating to which debt it is to be applied, the creditor may, at his option, apply it to the debt under limitation, so as to prevent the statutory bar. *Beck v. Haas*, 180.

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SUPERSEDEAS.

PROHIBITION—APPEAL.—An appeal bond in a sum less than the amount of the judgment or decree appealed from will not operate as a *supersedeas;* and the court in which the judgment was rendered cannot be restrained by prohibition from enforcing the same by execution. *State ex rel. v. Dillon*, 535.

SURPRISE. See PRACTICE, TRIAL, 8.

SURVIVAL OF ACTION. See PRACTICE, TRIAL, 6.

TAXES.

WHEN DEEMED TO BE LEVIED.—Under a stipulation requiring the lessee to pay "all assessments and taxes * * * that may be levied on or claimed from" the leased property during the term of the lease, he will be bound to pay all general taxes which become payable by law within the duration of the term, and all special tax bills whose issue shall be of a date within the same period. *Clemens v. Knox*, 185.

TRANSCRIPT. See PRACTICE, APPELLATE, 9, 14; RECORD.

GIVING DIRECTIONS TO CIRCUIT CLERK.—Where a party waits until the last day, before giving directions to the circuit clerk to make out and forward the transcript of the record, he does so at his peril; and if, for lack of time or pressure of other work in his office, the clerk is unable to complete the transcript in time, the appellant must bear the loss. *McCaffery v. Memphis & C. Railroad Co.*, 340.

TRANSFER TO SUPREME COURT. See JURISDICTION, 1, 2.

TRESPASS.

UNAVAILABLE DEFENCE.—It is no answer to an action for a trespass, that the defendant was acting as agent or contractor for another. In such cases all participants are liable as principals. *Welsh v. Stewart*, 376.

TRUST DEED.

CONVEYANCE TO PAY DEBTS.—An instrument wherein the debts of the grantor are named as the consideration of the conveyance; wherein the transfer is absolute, with no clause of defeasance on performance by the grantor; and whereby the grantees are to take immediate possession of the property and proceed to sell the same and distribute the proceeds among designated creditors, is not a mortgage, or a security for the payment of debts, but was properly construed by the trial court to operate as a deed of assignment, and to be enforced pursuant to the statute concerning assignments for the benefit of creditors. *Mills v. Williams*, 447.

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TRUSTEE. See ACTION, 1, 2; ADMINISTRATION, 1, 2, 3; PRACTICE TRIAL, 6.

DEPOSIT IN BANK.—A *bona-fide* deposit of trust funds in a bank, in the trustee's own name, it being clearly shown that it was trust funds, will protect him against loss which occurs not on account of the form of the deposit, but by the destruction or failure of the bank. It is different where there has been a mingling of the trust fund with the individual money of the trustee. *Atterberry v. McDuffee*, 603.

TRUST FUND. See FEES, 1, 2.

USER. See PUBLIC ROAD.

VARIANCE. See EVIDENCE, 22.

VENDEE. See SALE, 1, 2; COMMISSIONS, 1, 2.

VENDOR. See COMMISSIONS, 1, 2; EVIDENCE, 1, 8, 9; PERSONAL PROPERTY.

VENUE. See JURISDICTION, 3.

1. AFFIDAVIT FOR CHANGE.—An applicant for a change of venue must set forth in his affidavit not only the cause of the application, but also "when he obtained his information and knowledge of the existence thereof." *Smith v. St. Louis & S. F. Ry. Co.*, 135.

2. MOTION AFTER VENUE CHANGED.—When a cause has been removed by change of venue to another court, a motion in the court which has thus lost its jurisdiction has no standing or validity for any purpose, and should not be admitted in evidence by certified transcript on the trial of the cause in the proper court. *State to use v. Rayburn*, 385.

VERDICT. See PRACTICE, TRIAL, 3, 19; MECHANIC'S LIEN, 4 PRACTICE, APPELLATE, 16, 18.

EVIDENCE TO JUSTIFY.—While the law does not require positive proof, it does require such proof as will leave no reasonable doubt of the existence of the fact upon which the verdict must rest. *Peck v. Missouri Pac. Ry. Co.*, 123.

WAIVER. See INSURANCE, 1, 3; PRACTICE, TRIAL, 11, 18; LANDLORD'S LIEN.

CONSIDERATION.—A consideration, such as is necessary to support a contract, is not necessary to support a waiver. *Griffith v. Gillum*, 33.

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WILL.

DUTY OF EXECUTOR.—When there is direction in the will as to what shall be done with the testator's effects, all question or debate is closed. The will of the testator is the law for the executor. Although executors and administrators are only responsible for want of due care and skill, and the measure of care is that which prudent men exercise in the management of their own affairs, yet this rule only applies to matters left to the discretion of the executor. If the testator has asserted his own discretion the executor must obey it. *Powell v. Hurt*, 632.

WITNESS. See EVIDENCE, 16, 17; CONTRACT, 3.

REFRESHING MEMORY.—A witness who assisted in making out a writing, and who knows that its statements were true when made, may refresh his memory from such writing, although he has no independent recollection of all the facts therein appearing. *Abel v. Strimple*, 86.

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RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library-room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion

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of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver, or return of service endorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to

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set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE.—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS. — QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The Clerks of the several Circuit Courts and other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*) "*Summons issued on the — day of —, 188–, executed on the — day of —, 188–;*" and if any pleading be amended, the Clerk, in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such

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by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this court may have before it the same matter which was decided by the Court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED.—In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this Court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent or defendant in error shall, at least eight days before the

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day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court seven copies of the same; and the counsel for appellant or plaintiff in error may, if he desires, within five days after the service on him of the respondent's or defendant in error's abstract and brief as aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side paging, shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless, for good cause shown, the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called

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for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the Court thereupon and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed, and this statement, with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question, decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE.—On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that

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appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the Court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial Court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial Court, shall first notify the adverse party, or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Attest:

F. C. FARR, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

IN FORCE ON AND AFTER MARCH 1, 1885.

RULE 1.—APPEARANCE OF COUNSEL. It shall be the duty of counsel for appellant or plaintiff in error to enter his appearance in this Court, in writing, at least ten days before the first day of the term to which the appeal or writ is returnable; and of counsel for respondent or defendant in error to enter such appearance at least five days before said return day. Appearance may be entered by written notice to the clerk of this Court, giving name and address of counsel. Appearance of additional counsel may be entered at any time before the hearing. No counsel will be recognized in a cause until his appearance is entered.

RULE 2.—MOTIONS. All motions in a cause shall be in writing, signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the

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briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver, or return of service endorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other Court having, by statute, jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given,

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and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial Court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERKS IN MAKING OUT TRANSCRIPTS. The Clerks of the several Circuit Courts and

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other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process of its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*) "*summons issued on the — day of — 188–, executed on the — day of — 188–;*" and if any pleading be amended, the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it may be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the Court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all cases, the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least ten days before the cause is called for trial, four copies of a brief, containing—*First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects an argument supporting each proposition made

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or relied on. The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before the day on which the cause is called for hearing, and the counsel for respondent, or defendant in error, shall, at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing. When no attorney has entered his appearance for the adverse side, filing copies of briefs with the Clerk shall be deemed sufficient service under this rule. It shall be deemed a sufficient compliance with rule fifteen, if a copy of a brief in any case shall be delivered to the adverse counsel within the time required by said rule: *Provided*, that the evidence of such delivery, together with the requisite number of copies of the brief, be filed with the Clerk at least one day before the day on which the case is called for hearing.

Rule 16.—Briefs After Submission. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon motion in writing and good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

Rule 17.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal

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parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side paging, shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior Court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless, for good cause shown, the court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered fifteen, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at its discretion, continue to reset the cause, on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the Courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the Court thereupon, and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed; and this statement with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the Court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

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RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute, or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under Section 3717, Revised Statutes of 1879, as amended by an act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him ; the defendant in error, or respondent, will thereupon, read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the Court below ; the defendant in error, or respondent will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial Court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

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RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal, or writ of error, or to affirm the judgment of the trial Court, shall first notify the adverse party, or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

RULE 25.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the courtroom, and entertain and dispose of all oral motions, but may delegate such duty to any of his associates.

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